

COMMITTEE HEARING  
PRESIDING MEMBERS PROPOSED DECISION  
BEFORE THE  
CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	
Application for Certification	)	Docket No.
for the El Segundo	)	00-AFC-14
Modernization Project	)	
_____	)	

CITY COUNCIL CHAMBERS  
EL SEGUNDO CITY HALL  
350 MAIN STREET  
EL SEGUNDO, CALIFORNIA

MONDAY, FEBRUARY 23, 2004

1:02 p.m.

Reported by:  
James Ramos  
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

William J. Keese, Chairman, Presiding Member

HEARING OFFICER AND ADVISORS

Garret Shean, Hearing Officer

Rick Buckingham, Advisor to Chairman Keese

Scott Tomashefsky, Advisor to Chairman Keese

STAFF AND CONSULTANTS PRESENT

David Abelson, Senior Staff Counsel

James W. Reede, Jr., Project Manager

Terrence O'Brien, Deputy Director  
System Assessment and Facilities Siting Division

Arlene Ichien, Staff Counsel

PUBLIC ADVISER

J. Mike Monasmith, Associate

APPLICANT

John McKinsey, Attorney,  
Livingston and Mattesich

Ron Cabe, Project Manager  
David Lloyd, Secretary  
El Segundo Power II LLC  
NRG Energy, Inc.

Tim E. Hemig, Manager, Environmental Services  
NRG Energy, Inc.

INTERVENORS

Paul Garry  
City of El Segundo

INTERVENORS

Richard G. "Nick" Nickelson

Bob Perkins  
Michelle Murphy  
Murphy/Perkins

Lyle Cripe

Mark Gold, Executive Director  
Heal The Bay  
representing the Santa Monica Baykeeper

Craig Shuman, Staff Scientist  
Heal The Bay

Laurie Jester  
City of Manhattan Beach

ALSO PRESENT

Tom Luster  
California Coastal Commission

Floyd Carr

Elsie Cripe

Helen Duncan, Executive Director  
Chamber of Commerce  
City of Manhattan Beach

Craig Shuman

Daniel L. Ehrler, Executive Director  
The Chamber  
City of El Segundo

Kelly McDowell  
City Council Member  
City of El Segundo

Mark Tetterer, Manager of Customer Development  
West Basin Municipal Water District

Tony Rizk  
Regional Water Quality Control Board

ALSO PRESENT

Bill Eisen  
Residents for a Quality City

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

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## P R O C E E D I N G S

1:02 p.m.

PRESIDING MEMBER KEESE: Welcome,  
everybody. I'll call this hearing to order; a  
hearing of a Committee of the California Energy  
Commission on the El Segundo Modernization  
project.

I'm Bill Keese, Chairman of the Energy  
Commission, and assuming the role of Chairman of  
this Committee with the retirement of Commissioner  
Pernell. On my right is Garret Shean, our Hearing  
Officer who will be conducting the bulk of the  
hearing. To my left is Scott Tomashefsky, my  
Advisor, and Rick Buckingham, my Advisor.

As we get started here can we have the  
parties please identify themselves? Applicant.

MR. MCKINSEY: My name is John McKinsey,  
counsel for the applicant El Segundo Power II,  
LLC. We've got several people here, but let me  
just introduce a few people that might end up  
speaking. Ron Cabe is here; and also present is  
David Lloyd and Tim Hemig.

PRESIDING MEMBER KEESE: Thank you.  
Staff.

MR. ABELSON: Thank you, Commissioner

1       Keese. My name is David Abelson; I am the  
2       attorney representing the Energy Commission Staff  
3       in this matter. We also have several people  
4       participating in today's hearing, but the ones who  
5       are likely to speak include Terry O'Brien, Deputy  
6       Division Chief of the Siting Division; James  
7       Reede, who is the Project Manager for the El  
8       Segundo case, and I'll have some words to say, as  
9       well.

10               PRESIDING MEMBER KEESE: Thank you. Do  
11       we have any intervenors at this time? Would you  
12       come forward to a mike? There's one on the podium  
13       over here. Identify yourself for the record,  
14       please.

15               MR. GARRY: I'm Paul Garry with the City  
16       of El Segundo.

17               PRESIDING MEMBER KEESE: Thank you.

18               DR. GOLD: I'm Dr. Mark Gold, Executive  
19       Director of Heal The Bay; I'm also representing  
20       the Santa Monica Baykeeper.

21               MR. NICKELSON: Richard Nickelson; I'm a  
22       resident of Manhattan Beach.

23               MR. CRIPE: Lyle Cripe, resident of  
24       Manhattan Beach.

25               DR. REEDE: Excuse me, Commissioner



1       Keese, both of those last gentlemen are  
2       intervenors.

3               PRESIDING MEMBER KEESE:   Thank you.   Any  
4       other intervenors?

5               MR. CARR:   I'm not sure whether I'm an  
6       intervenor or what, but I would like to speak  
7       later.

8               PRESIDING MEMBER KEESE:   Yes.   Everybody  
9       will get an opportunity to speak here.

10              MR. CARR:   Floyd Carr.

11              PRESIDING MEMBER KEESE:   And you're  
12       welcome to introduce yourself for the record.

13              MR. CARR:   I'm Floyd Carr; I'm a  
14       resident of the City of El Segundo.

15              PRESIDING MEMBER KEESE:   Thank you,  
16       Floyd.

17              MS. DUNCAN:   I'm Helen Duncan; I'm the  
18       Executive Director of the Manhattan Beach Chamber  
19       of Commerce.

20              PRESIDING MEMBER KEESE:   Thank you.

21              DR. SHUMAN:   Dr. Craig Shuman; I'm a  
22       Staff Scientist with Heal The Bay.

23              MR. EHRLER:   Good afternoon; my name's  
24       Dan Ehrler; I'm the Executive Director with the El  
25       Segundo Chamber of Commerce.

1                   PRESIDING MEMBER KEESE: Thank you.

2                   MS. JESTER: Good afternoon; Laurie  
3 Jester, intervenor, City of Manhattan Beach.

4                   MR. McDOWELL: Good afternoon, Mr.  
5 Chairman. Kelly McDowell, El Segundo City  
6 Council, and I'll have a few remarks at the  
7 appropriate time, thank you.

8                   PRESIDING MEMBER KEESE: Thank you. Do  
9 we have anybody, and I would imagine that covers  
10 most of the City and other governmental  
11 jurisdiction, represented in the audience?  
12 Anybody else?  
13 On the phone here?

14                  PRESIDING MEMBER KEESE: One second,  
15 please. We'll get to you in one second.

16                  MR. TETTEMER: Thank you. My name is  
17 Mark Tettemer; I'm with West Basin Municipal Water  
18 District.

19                  PRESIDING MEMBER KEESE: Thank you.

20                  MR. TETTEMER: Thank you.

21                  PRESIDING MEMBER KEESE: Okay, now on  
22 the phone.

23                  MR. LUSTER: Tom Luster with the Coastal  
24 Commission.

25                  PRESIDING MEMBER KEESE: Thank you.

1       Anyone else on the phone?

2                   MS. ICHIEN:   Arlene Ichien from the  
3       Energy Commission.

4                   PRESIDING MEMBER KEESE:   Welcome,  
5       Arlene.

6                   Okay, before we get started, Mr.  
7       McDowell, speaking on behalf of the City, or  
8       yourself, whatever the case may be.

9                   COUNCILMAN McDOWELL:   Thank you, Mr.  
10      Chairman.   Good afternoon to you, staff, welcome  
11      to El Segundo.   My name's Kelly McDowell; I'm a  
12      Member of the El Segundo City Council.

13                  Our City has watched this proceeding  
14      with a great deal of interest, and has presented  
15      numerous comments and participated extensively in  
16      the workshops that have been held during the  
17      siting process.

18                  And at the conclusion of the hearing  
19      phase of the process the City of El Segundo  
20      provided a letter of support of the repowering  
21      project in favor of the applicant.   And I've heard  
22      general support for the project from citizens in  
23      my community and business leaders, as well.

24                  Replacing the worn out, older units at  
25      the plant with cleaner, more efficient gas

1 turbines will help assure reliable electricity for  
2 this community and the region and will provide  
3 important environmental benefits.

4 Switching from potable water to  
5 reclaimed water for cooling will benefit water  
6 resources in the community, as well.

7 A concern has been expressed by some  
8 individuals regarding potential air quality  
9 impacts from the repower project. We understand  
10 that the draft Presiding Member's Proposed  
11 Decision of the Commission addresses air quality  
12 issues in great detail. And I know that the South  
13 Coast Air Quality Management District has approved  
14 in its final determination of compliance,  
15 reviewing and approving the air emissions features  
16 of the repower project, and that the draft  
17 proposed decision incorporates the significant  
18 features of that document.

19 Contrary to some comments made within  
20 the local community the repowering project, while  
21 producing more electricity, is not expected to  
22 increase particulate matter emissions over  
23 historic levels. And through the use of state-of-  
24 the-art emissions controls, will substantially  
25 decrease smog precursor emissions historically

1 associated with this power plant.

2 The people associated with the El  
3 Segundo Power Plant have been good corporate  
4 neighbors in our City. They've been active in the  
5 community programs. Last year they earned the  
6 Community Betterment Award from the Chamber of  
7 Commerce; and they were also acknowledged by local  
8 officials from throughout the area.

9 Additional landscaping for the plant and  
10 enhancements to the existing bike path, which were  
11 recommended by the Commission, will further  
12 benefit the community, and the community of  
13 Manhattan Beach, as well.

14 Repowering the existing plant wisely  
15 utilizes existing infrastructure and will continue  
16 to provide a very important revenue source to my  
17 City in the form of utility user tax revenues for  
18 use of natural gas, which is a clean fuel.

19 We appreciate the opportunity to provide  
20 comments today supporting the Presiding Member's  
21 Proposed Decision, and I thank you.

22 PRESIDING MEMBER KEESE: Thank you very  
23 much.

24 MR. PERKINS: Pardon me. I understand  
25 we were asked to introduce ourselves if we're

1 present and parties. I'm Bob Perkins; I am an  
2 intervenor and I am present.

3 PRESIDING MEMBER KEESE: Thank you. Mr.  
4 Monasmith. We also have present here our Public  
5 Adviser for the Energy Commission available to  
6 assist anybody who'd like to participate in this  
7 proceeding. Mike Monasmith, who has just stepped  
8 in from outside where he will have blue cards if  
9 any of you would like to indicate that you'd like  
10 to testify or make comments later. It helps us a  
11 great deal if you'll fill out these cards and  
12 submit them. And then we will know what our  
13 agenda is going to be. So, Mr. Monasmith has  
14 those cards available.

15 Mr. Shean, would you please indicate  
16 what the purposes of our hearing are and what we  
17 will be going forward with today.

18 HEARING OFFICER SHEAN: Thank you, Mr.  
19 Chairman. The purpose of today's hearing is to  
20 take comments on the Presiding Member's Proposed  
21 Decision. That proposed decision is subject to  
22 the 30-day public comment period which will end on  
23 March 1st.

24 I just want to indicate that what has  
25 happened so far is the Committee requested the

1 parties to the proceedings provide us some written  
2 comments in advance of today's hearing so that we  
3 could get a general idea of the positions of the  
4 parties and what they wish to address the  
5 Commission on, and what specific either problems  
6 that they saw with the proposed decision, or any  
7 of its content.

8 So I want to emphasize that the public  
9 comment period, even for the intervenors and  
10 parties, is open until March 1st, at which time  
11 any party should have his or her or its final  
12 comments in to the Committee.

13 What we proposed to do today, I think,  
14 is to go through, party-by-party, the general  
15 comments without repeating in detail what's been  
16 submitted in writing, but perhaps emphasizing the  
17 one or two points that are the most important to  
18 that party. And then we'll have any responding  
19 comments to -- statements or comments by that  
20 party. And probably some questions from the  
21 Committee.

22 I just want to indicate that one of the  
23 things that had occurred here in the preparation  
24 of the PMPD is that we were using electronic files  
25 for the conditions of certification that we

1 believed to be up to date. Apparently they were  
2 not, and there are some issues that the parties  
3 have with regard to whether or not the conditions  
4 that are enumerated in the proposed decision  
5 represent the last of the agreed-to version of  
6 that condition.

7 The applicant has, as part of its  
8 comments, submitted a table which we just feel  
9 might be convenient to begin, as a beginning  
10 point, to work from because it lists all the  
11 conditions that are in the proposed decision.

12 And what I have done is to basically  
13 supplement that table with a statement of whether  
14 or not some other party has a proposed change to  
15 any particular condition. So I ought to indicate  
16 at this particular point that what we have are  
17 some staff suggested changes, some changes  
18 suggested by the City of El Segundo, and the City  
19 of Manhattan Beach. And if there's anything  
20 further, we'll just ask any particular party to  
21 the proceedings who has a matter related to any  
22 particular condition to identify the condition and  
23 any suggested change.

24 So, unless there's anything further in a  
25 housekeeping nature that we need to discuss, we're



1 prepared to launch now with a brief recap, if you  
2 will, or an emphasis on the most important points  
3 of the written comments of the parties which have  
4 been submitted to date.

5 What we'll do as soon as the applicant's  
6 counsel is ready we'll go with the applicant.

7 MR. MCKINSEY: Thank you very much, Mr.  
8 Shean. I've been advised there's a couple other  
9 public agency members that may not be able to stay  
10 here very long and wanted an opportunity to  
11 comment. I think Mark Tettermer from West Basin,  
12 and there may be another individual, I don't know.  
13 The Chamber of Commerce of Manhattan Beach and the  
14 Chamber of Commerce of El Segundo.

15 So, I'm just asking if you'd prefer to  
16 accommodate them or --

17 HEARING OFFICER SHEAN: All right, if  
18 that will take care of doing some people who would  
19 not otherwise be standing by, why don't we attempt  
20 to do that with some dispatch then.

21 So, yes, we have the representative from  
22 West Basin. Why don't you come forward, sir, and  
23 then the Chamber of Commerce.

24 MR. TETTEMER: Good afternoon and thank  
25 you for the consideration. Again, my name is Mark

1 Tettermer; I'm with West Basin Municipal Water  
2 District. And want to just provide a very brief  
3 update in terms of a couple of the items regarding  
4 the use of recycled water.

5 First of all, the facility has, for many  
6 years, used recycled water for its landscape  
7 irrigation and for that we're appreciative. West  
8 Basin is trying to continually grow its program,  
9 and so we always like to speak in support of  
10 customers who do use recycled water.

11 Furthermore, in the application it does  
12 talk about the applicant and West Basin looking to  
13 use recycled water for their boiler needs, and  
14 just wanted to share with the Commission that we  
15 are actively in dialogue with them to find out  
16 what their water quality needs are relative to our  
17 recycled water, and what improvements will be  
18 needed for recycled water. But we just wanted to  
19 share that we are actively discussing that with  
20 the applicant.

21 And finally, wanted to recognize them  
22 for their help in our ocean desalination effort.  
23 The Commission may know, there's a small pilot  
24 facility there at the applicant's property, used  
25 for a pilot facility that we have to test the

1 viability of desalination. So we wanted to  
2 recognize them and thank them for their support of  
3 our desalination effort.

4 And with that I'd be happy to answer any  
5 questions.

6 HEARING OFFICER SHEAN: Thank you very  
7 much.

8 MR. TETTEMER: Thank you.

9 HEARING OFFICER SHEAN: We appreciate  
10 it. Okay, we have the Chamber of Commerce? Yes.

11 MS. DUNCAN: Thank you. I'm Helen  
12 Duncan, Manhattan Beach Chamber of Commerce. I  
13 want to express how much the Chamber and our  
14 community appreciates all that El Segundo Power  
15 does for us. They're a very good neighbor.

16 And I've talked with many people in our  
17 north end, which is right next to the power plant.  
18 They are all for having this go ahead.

19 Not only has the El Segundo Power been  
20 good to us at the Chamber, but also to our ed  
21 foundation and to our schools. They're a very  
22 good neighbor and I think it's very important that  
23 we keep them in our community and have things go  
24 forward.

25 So, thank you for hearing me, and I

1 appreciate it.

2 HEARING OFFICER SHEAN: Thank you, Ms.  
3 Duncan. Yes, sir.

4 MR. EHRLER: Hello, again. I'm Dan  
5 Ehrler, Executive Director with the El Segundo  
6 Chamber of Commerce. And in respect to your  
7 earlier request about not being repetitive I just  
8 would only want to reiterate what has been said  
9 both by Council Member McDowell and Helen from  
10 Manhattan Beach.

11 The El Segundo Chamber was very proud to  
12 present the Community Betterment Awards that  
13 Councilman McDowell talked about. And it's for  
14 very good reasons that you've heard about, and I  
15 would just again reiterate, not only has El  
16 Segundo Power been a contributor to the community  
17 in countless hours of the people that work with  
18 that company, but as well with its resources to  
19 make real improvement in the quality of life for  
20 us here that has been very very significant.

21 We are in complete support of the  
22 repowering project and we hope that your  
23 consideration will, as well, agree with our  
24 support. Thank you very much.

25 HEARING OFFICER SHEAN: Thank you very

1 much. Appreciate your brevity of comments from  
2 everyone here as we get this meeting underway.

3 All right. With that, perhaps we can go  
4 to the applicant and -- you got another one?

5 MR. MCKINSEY: Yes, somebody wants to  
6 come forward -- apparently a member of the public  
7 that just wanted to comment and leave.

8 HEARING OFFICER SHEAN: All right.

9 MR. CARR: Didn't know the right time to  
10 do it, sir. Mr. Chairman and Members of the  
11 Commission, my name's Floyd Carr. I am 82-year  
12 resident of El Segundo. I was born up on Sheldon  
13 Street. And we live now on the south end of  
14 Hillcrest Street, which is about as close as you  
15 can get to Scattergood and still be in El Segundo.

16 Talking to my wife before I came down  
17 here. We, you know, are close to two power  
18 plants, Scattergood and the El Segundo. And in  
19 all the 50 years we've lived up there we haven't  
20 really had a problem.

21 We feel that this repowering of the  
22 plant makes so much sense that it's a shame that  
23 it takes so long to get it done. We read in the  
24 paper just the other day where they're closing a  
25 power plant, I think in Bakersfield or somewhere,

1 and there was a notice --

2 PRESIDING MEMBER KEESE: An oil  
3 refinery.

4 MR. CARR: -- I'm sorry?

5 PRESIDING MEMBER KEESE: It's an oil  
6 refinery.

7 MR. CARR: Well, I read something about  
8 a power plant. It said in the paper, in The L.A.  
9 Times, that it could cause blackouts this summer  
10 if that plant goes down.

11 So I just wanted to add my -- I think I  
12 speak for most of the people on my street up  
13 there, and we're about as close as you can get.

14 Thank you for your time.

15 PRESIDING MEMBER KEESE: Thank you.

16 HEARING OFFICER SHEAN: Thank you, Mr.  
17 Carr.

18 PRESIDING MEMBER KEESE: Anybody else  
19 who's got a pressing time concern before they hear  
20 the debate?

21 HEARING OFFICER SHEAN: Okay.

22 PRESIDING MEMBER KEESE: One more, one  
23 more.

24 MS. CRIPE: I'm Elsie Cripe and I live  
25 on 45th Street, 4421 Ocean Drive. I'm totally

1       against your plans as of now. There are tests  
2       that were supposed to be made, biological, that  
3       were not made. You've been there 50 years. I  
4       think it's wonderful that El Segundo loves you,  
5       because they've been polluted now for 50 years.  
6       You've polluted our water; you've polluted our  
7       air. And it seems that the emissions are going to  
8       be worse.

9               We have spent over three years -- I'll  
10       make this brief -- discussing it. There are a lot  
11       of things that are left undone.

12              Thank you.

13              PRESIDING MEMBER KEESE: Thank you.

14       Okay.

15              MR. MCKINSEY: Thank you for  
16       accommodating those individuals.

17              I'm not too sure how we should quite go  
18       about the comments. One thing I can kind of  
19       suggest, one thing I can accomplish is to just  
20       kind of go through our comments. I don't really  
21       want to reiterate what we've already said, so I  
22       what I think I might do is indicate, based on the  
23       other comments we've seen, where we agree with  
24       other proposed changes. And also, perhaps,  
25       reiterate a couple of things that weren't said

1       that well. But I'm thinking it might turn into a  
2       dialogue about proposed change, but as you  
3       indicated, kind of like to just present so I can  
4       start off that way.

5               HEARING OFFICER SHEAN: And I think what  
6       we're going to end up doing is each party that,  
7       so, for example, the staff that has proposed some  
8       change to the condition, we probably want that  
9       party to be the lead on getting it out. And then  
10      response from you or any other party. So I think  
11      you had a couple of suggested changes to the  
12      conditions, if you just want to explain what those  
13      are.

14             MR. MCKINSEY: Sure.

15             HEARING OFFICER SHEAN: And for the  
16      staff we'll do the same. And for the Cities we'll  
17      do the same. And I think that will accomplish  
18      what we want with respect to conditions.

19             And if there's something further you  
20      wanted to say, that would be fine.

21             MR. MCKINSEY: Let me begin, I think our  
22      comments were fairly brief and to the point, and  
23      that we found the Presiding Member's Proposed  
24      Decision to be acceptable and sound, and a project  
25      that we're very excited to build.



1           Where we made comments we were either  
2       making comments that were necessary, we felt,  
3       often to reflect what the parties had agreed upon.  
4       And in a couple of cases, an actual new proposed  
5       change to the conditions.

6           And the primary condition where we  
7       expressed some concern over probably the only real  
8       particular issue we had with the Presiding  
9       Member's Proposed Decision is Bio-2, which  
10      requires an aquatic filter barrier type study to  
11      be performed.

12          And our comments, I think, explain it  
13      pretty well. Let me summarize it very briefly.  
14      As I understand the intent of the condition, and  
15      it's pretty much what we'd intended when we  
16      proposed a different version of it a year ago, was  
17      to try to work with the Water Board so that the  
18      resultant study would enable the installation,  
19      should the Water Board find it something they  
20      wanted to order as installation of an aquatic  
21      filter barrier at the inlet structure.

22          Of course the tremendous benefit of such  
23      a technology which is in use in other settings in  
24      the United States and proving to be very effective  
25      is that it can come close to eliminating

1       entrainment, which has been really the one issue  
2       that's been contended among the parties in this  
3       proceeding.

4               There are, however, issues with whether  
5       or not it's feasible in a setting such as this in  
6       an open ocean bay environment. And thus the  
7       study's purpose is to determine whether there is  
8       really a true feasibility. And we've got some  
9       indications that it's quite probably feasible and  
10      should it be installed. It would be a pretty  
11      incredible accomplishment because it may open the  
12      door for use of this technology at that point in  
13      many other very similar open-ocean settings. So  
14      we had proposed to conduct a study.

15             Our concerns with the condition were  
16      primarily on the procedural side in terms of  
17      making sure that it's set up so that we're able to  
18      do it in the way in which the Water Board ends up  
19      having us do it and incorporates it into what will  
20      probably most likely be our next NPDES permitting  
21      cycle which would involve the new regulations.  
22      And which are probably going to be involved in  
23      finding ways to reduce entrainment in terms of how  
24      it's being mandated in the new regulations.

25             And thus we wanted to make sure that the

1 study wasn't something that we did just for the  
2 Energy Commission, but also something that the  
3 Water Board would be able to work with. And as I  
4 understood, that was your intent. So our changes  
5 in terms of the language are focused solely on  
6 making sure that the Water Board is able to make  
7 full use of the study and be able to order it to  
8 be installed without having to conduct some other  
9 separate study or proceeding.

10 I've read all the comments from all the  
11 other parties and primarily they were on biology,  
12 but staff also prepared a significant number of  
13 comments on other conditions. And several other  
14 parties made comments on conditions.

15 And fundamentally I think that most the  
16 record and the decision of the Committee speaks  
17 for itself. And we don't feel a need to try to  
18 reiterate things that have been said for the last  
19 few years unless there's a particular thing you'd  
20 like to hear from.

21 Now, you did indicate there were five  
22 questions you wanted us to talk about in terms of  
23 flow cap calculations. And I think probably the  
24 one thing you can summarize more than anything  
25 else that we would be particularly useful in

1 discussing is the effect of the flow cap on  
2 electricity production, and the ability of the  
3 power plant to meet the demands for electricity in  
4 the market. Additionally, the general effect of  
5 lowering flow cap further and the effects that  
6 that would have.

7 A lot of this we presented a year ago  
8 when we proposed flow cap, and also in the  
9 evidentiary record, along the lines that the flow  
10 cap was a pretty tough thing for us to come up  
11 with. And we found it hard to swallow, I'll put  
12 it that way, and then taking on a constraint on  
13 the El Segundo Generating Station to generate  
14 electricity.

15 We were driven to do that for two  
16 reasons. One was an attempt to find a way to  
17 bridge the difference of opinion over whether or  
18 not this project is capable of having any kind of  
19 impacts and/or whether those impacts could be  
20 something that would require mitigation in a way  
21 in which we could propose enhancement that would  
22 also provide and address and eliminate those  
23 concerns even if you took them at their face  
24 value.

25 So we proposed a flow cap. And we found

1       that in doing so as we worked through the  
2       methodology it worked like this.  When we build  
3       the new facility we'll have a cap of 139 billion  
4       gallons per year and we can think of that as a big  
5       bucket of water.

6               And out of the 139 billion gallons per  
7       year we assume that the new facility would then  
8       run its cooling system at 100 percent.  That's the  
9       only way we could model it for assumptions.

10              The math is pretty easy because there's  
11       365 days in a year and the cooling system is more  
12       or less about 200 million gallons per day.  And  
13       thus all you really have to do is multiply by two  
14       and you end up with 70 billion gallons coming out  
15       of that 139 billion gallon bucket that we would  
16       want to allocate to the cooling system number  
17       one's applying the new facility.  That leaves us  
18       about 69 billion gallons left in the bucket for  
19       Units 3 and 4, the other cooling system.

20              The next thing we would take out of the  
21       bucket is the lowest operating levels of that  
22       cooling system.  So even when those older units  
23       are not operating there's going to be a minimum  
24       flow.  And at an absolute minimum it's 100 million  
25       gallons just to maintain the system clean, and

1       also to provide the dilution for the sanitary  
2       waste to go through that outfall.

3               Now, one advantage of this project is  
4       we're eliminating all sanitary waste discharge  
5       from the project into the ocean as it currently  
6       goes, and it's going to go through cross-connected  
7       to the City of Manhattan Beach. But nevertheless  
8       we would still have to run the system in order to  
9       maintain it clean.

10              So that's, one pump is 100 million  
11       gallons a day, so it's another pretty easy number.  
12       There's 365 days a year. And so that 365 becomes  
13       about 36.5, we can just call it 36 billion  
14       gallons. So we've got 70 billion gallons that we  
15       would allocate to the new units; another 36 to  
16       maintain the cooling system year-round.

17              That leaves us, if you do the 70 plus  
18       the 36, 106, about 33 billion gallons left in the  
19       bucket to use for cooling when we want to operate  
20       Units 3 and 4.

21              PRESIDING MEMBER KEESE: But you would  
22       use some part of that flow for cooling, also?

23              MR. MCKINSEY: Correct. We've already  
24       got this 100 million gallons per day flow going to  
25       the system. So we don't have to add 400, we have

1 to add 300 more to bring it up to its 400 million  
2 gallons flow.

3 PRESIDING MEMBER KEESE: Okay.

4 MR. McKINSEY: Units 3 and 4 are unique  
5 in several ways. They're a technology in an era  
6 when it's kind of no longer being used, and a lot  
7 of its vintage are being retired during this era.  
8 One of the advantages they have is that they're  
9 able to idle at low powers and respond quickly to  
10 market demand. So they're able to basically  
11 operate, and when they're commanded during peak  
12 hours for high power levels they respond.

13 One of the disadvantages of them,  
14 however, is they don't really operate like  
15 shutdown, you can't fire them up like a gas  
16 turbine, they have to idle. And that means that  
17 the cooling systems, essentially whenever the  
18 system's operating it's operating at its 400  
19 million gallons. So even though the plants might  
20 not be producing electricity at higher power  
21 levels, the cooling system is functioning.

22 So we pretty much have to assume that  
23 for every day we want to operate Units 3 and 4,  
24 that's 400 million gallons or .4 billion out of  
25 that 36.5 billion gallons left. That's close to

1 half. If you do a few other inefficiencies, you  
2 pretty much can say that with the 139 billion gap  
3 we get about double that 33 billion gallons or 66  
4 days of operation of Units 3 and 4. We won't get  
5 100 percent power because they may not be --  
6 they're obviously in the future and with the new  
7 facility they're going to be much more peakers.  
8 So we get on the order of about 70 out of the  
9 year, or somewhere maybe around one to two months,  
10 maybe three months of use.

11 One of the other complicating factors in  
12 the flow cap is that it's not a regenerating  
13 thing; it's looked at on an annual term, meaning  
14 that as we use the water we're going to be  
15 thinking towards the end of the year. And  
16 obviously we anticipate the most likely months  
17 that we would run Units 3 and 4 would be during  
18 summer months when demand is higher and they're  
19 profitable.

20 However, there's also sometimes odd  
21 months in the year. So one of the things we kind  
22 of assumed was should Units 3 and 4 be requested  
23 later towards the end of a year there's a good  
24 chance they wouldn't be able to run. There's no  
25 way we would know, say they're requested in



1 September or October or November and we may have  
2 used up enough water that all the water we had  
3 left is being allocated to insure the new, more  
4 efficient units run for the rest of the year.

5 So, one clear implication of the flow  
6 cap is that Units 3 and 4 will be constrained in  
7 how much they can operate and may not be able to  
8 operate in the later months of the year if they  
9 were demanded in those later months. We  
10 anticipated them being available during the summer  
11 peaking months.

12 Lowering the flow cap further, not  
13 particularly speaking in terms of whatever reason  
14 you may have to do that, just in terms of its  
15 effect means that you're taking out of that 33  
16 billion gallons left. So going to 126 takes away  
17 7 billion gallons from -- or excuse me, 10 billion  
18 gallons -- 13 billion balloons, and that's kind of  
19 equivalent of a month of operation of Unit 3 and  
20 4. It also means that the amount getting left is  
21 getting smaller and it can constrain them to the  
22 point where, you know, the capacity factors get  
23 lower. And that can affect the profitability.

24 We didn't propose this flow cap  
25 nonchalantly. We looked at it carefully a year

1       ago, a year and a half ago when we said, hey, this  
2       is a way to bridge the gap. And we worked with  
3       the numbers and we said, well, we can kind of  
4       squeeze it in.

5               So it means that the 100 would be  
6       absolutely impossible; Units 3 and 4 can't  
7       operate. We would go over the 100 million gallons  
8       per year just idling the system. 126 means  
9       they're even more constrained and that's very  
10      painful and more potential issues.

11             There's something else that should be  
12      said amidst this, and that is that another reason  
13      we were comfortable with this idea is that we know  
14      there's a chance in the future of changes at the  
15      facility. The now imminently pending regulations  
16      that should be released at anytime, they've been  
17      signed, for existing facilities under the Clean  
18      Water Act are coming out. And they're going to  
19      require -- we know pretty much exactly what they  
20      say, though they're not formally published yet --  
21      they're going to require that we not only conduct  
22      a study, but they have pretty much a plan to  
23      require across-the-board reductions in  
24      entrainment.

25             And so regardless of what those impacts,

1       they're not only based on impacts, they're based  
2       on some calculations, they allow other methods of  
3       reducing impacts. And so reducing entrainment.  
4       Which means that should the Water Board ultimately  
5       result in us installing other technology to reduce  
6       entrainment, that might qualify for a reduction in  
7       entrainment. There's a good chance we would  
8       nevertheless want to include reducing flows as a  
9       way of doing that.

10               And so we kind of realize that the  
11       bigger picture is that the entrainment and the  
12       flow of dynamics at the facility are going to  
13       change in the future, and discount kind of sets us  
14       up for that. And the condition, itself,  
15       accommodates the idea of it, depending on what the  
16       Water Board orders, we end up back here  
17       explaining, well, here's how the Water Board  
18       finally sorted it out. And we'd like to bring the  
19       CEC permit now into coordination with that. And  
20       the condition accommodates that.

21               PRESIDING MEMBER KEESE: Let me just  
22       mention that I think that's what we're going to  
23       have to -- I hope that we do focus on this as we  
24       go on because there is an inter-relationship here  
25       that we have to look at between the different,

1        what the different parties have asked for.

2                DR. REEDE:  Somebody just joined.

3                PRESIDING MEMBER KEESE:  Did somebody  
4        join us?  As long as we did have a little  
5        interference over the phone here, I would ask  
6        Arlene and Tom, somebody evidently is picking up  
7        something on your desk every once in awhile and  
8        we're getting quite a bit of interference here  
9        intermittently.  So if you could try to avoid  
10       that, that would be great.

11               The volume is directly related, in your  
12       approach, to the amount of entrainment and  
13       impingement?

14               MR. MCKINSEY:  Yes, --

15               PRESIDING MEMBER KEESE:  So if there is  
16       no entrainment and impingement there should be,  
17       you would argue there should be no volume  
18       constraint?  I mean, help me out.

19               MR. MCKINSEY:  Yeah, the general rule,  
20       you can say, is that impingement and entrainment  
21       is a function of flow.  And so it's not  
22       necessarily literally proportional and flows at  
23       different depths and heights can have different  
24       effects, and other things can change.  But flow is  
25       kind of considered equivalent volume.

1           So the less water you run through the  
2       system the less larval types that you entrain and  
3       the less adult fish that you impinge. And so  
4       reducing flow reduces that. If you had zero flow  
5       you've got zero entrainment and impingement.

6           PRESIDING MEMBER KEESE: Okay, and to  
7       the extent that we or some other entity provides  
8       for reduced entrainment and reduced impingement,  
9       you would be pleased to see additional flow?

10          MR. McKINSEY: Correct. In other words,  
11       for instance other technology allows us to reduce  
12       entrainment, then our concerns over how you reduce  
13       flow change. If, for instance, --

14          PRESIDING MEMBER KEESE: Well, others'  
15       concerns. You're not --

16          MR. McKINSEY: Well, our concerns  
17       change. And many others, as well. The idea  
18       being, for instance, aquatic filter barrier  
19       technology is installed and works, and I'll be the  
20       first to say that there are parties out there that  
21       still question it. And in the new setting they  
22       would be very tough on wanting to make sure that  
23       it worked and really eliminated or greatly reduced  
24       entrainment. We never say it eliminates it.

25          But the idea being that it can reduce it

1 on the order of 90-plus percent in an ideal  
2 efficiency. And that's an equivalent of reducing  
3 flow by 90 percent, which means really the power  
4 of technologies, there's some other ones I've just  
5 heard that are apparently in the new regulations,  
6 a traveling screen-type system that has a finer  
7 mesh that they're suggesting is another potential  
8 technology. These things have the ability to  
9 allow cooling flows with little or no entrainment  
10 and/or impingement.

11 And for our project impingement has not  
12 really been an issue. We have the best available  
13 control technology in place that is very  
14 effectively taking care of impingement.

15 But for entrainment purposes that allows  
16 you to no longer be concerned about that part of  
17 the flow equation. There's still a thermal side  
18 in the modeling and the work we do to make sure  
19 that the heat discharge coming out of the plant  
20 doesn't injure. But these kind of technologies  
21 allow you to eliminate your concerns over flow.

22 There's one other comment I wanted to  
23 indicate since we're on this topic and kind of  
24 talking about buckets of water and effects. A  
25 monthly cap is an even tougher item for us to

1 stomach in terms of our ability to operate the  
2 facility.

3 From our perspective, and it's been our  
4 position throughout, we've got a permitted  
5 operating system that has been repeatedly found,  
6 and is still allowed to operate. If we just talk  
7 about intake system number one, it supplies 1 and  
8 2, and would supply the new facility, about 200  
9 million gallons a day, 208 to be exact. And  
10 that's a safe and allowed flow level.

11 So what we've done is, in an effect to  
12 enhance, we went out, we said well, what if we put  
13 an annual limit, since generally speaking we can  
14 say flow is proportional to entrainment, then  
15 let's put an annual limit which allows us to then  
16 still be able to operate the plant at the cooling  
17 levels we need. For the existing facilities  
18 that's 208 and 400 in the other cooling system.

19 And what we're really doing is we're  
20 banking. On the days when we're not flowing at 200  
21 and 400 in those systems, we're having water we  
22 can use at another point. And ultimately, the cap  
23 is at, I think it was 39 percent reduction, 37,  
24 from our maximum allowable flows. And that was a  
25 pretty substantial reduction.

1           But when we get into a monthly limit we  
2       got a lot more nervous because you said, well,  
3       now, you know, our bucket that we can kind of --  
4       we have is smaller, and we can only bank within  
5       the days of that month. So if we don't run the  
6       first ten days of the month we've got more for the  
7       other 20 days.

8           But the staff and a few other parties  
9       have indicated that flow caps needed to be on a  
10      monthly basis.

11          We offered up as another compromise idea  
12      to say well, then, let's constrain flows during  
13      three months which one, do have a significantly  
14      larger population of larval abundance during those  
15      months. Because those months are more likely than  
16      any other month to be low demand months. Meaning  
17      Units 3 and 4, the new units would be the least  
18      likely demanded, though they still could be.

19          And so we also offered those three  
20      months. And those are in the decision for three  
21      monthly numbers.

22          There's a good probability that those  
23      monthly numbers would pretty much eliminate 3 and  
24      4 operating in those months. And that kind of --  
25      the only reason we were able to accept that is in



1 the big picture that will probably not affect the  
2 overall ability to maintain the operation.

3 The idea that applying that same type of  
4 formula to all the months out of the year makes  
5 the whole idea un-viable and eliminates our  
6 ability to do that.

7 Now we would say really the more likely  
8 monthly limit to use is you multiply the max  
9 allowable, which is the permitted flow volumes in  
10 that system, and those won't change as a result of  
11 this project, you multiple those by the number of  
12 days in the month. And that's your flow. And, of  
13 course, that isn't really a flow limit.

14 The point being that in one sense we've  
15 already got a daily limit in place. That's been  
16 in place and will continue to be in place. The  
17 flow cap is putting a different type of limit,  
18 because it's a different timeframe, on the yearly  
19 level. And the idea of capping in the months is  
20 really an interesting though, but in a way you're  
21 kind of just coming down the middle. You've got a  
22 daily limit; you've got an annual limit; and now  
23 you're talking about trying to put limits in the  
24 middle of those time periods --

25 PRESIDING MEMBER KEESE: And putting

1 words in your mouth, again, you would argue that  
2 if you're going to reduce entrainment and  
3 impingement overall, then the daily shouldn't be  
4 as operative?

5 MR. MCKINSEY: No, the -- yeah, I mean  
6 obviously if we want to be able to say that given  
7 this is an existing level of entrainment and an  
8 existing allowed entrainment, the maximum  
9 entrainment we're allowed to cause is the  
10 equivalent of running both systems at full flows  
11 365 days a year.

12 And so we said let's reduce from that  
13 perspective by saying we'll take on a constraint  
14 of a lower maximum allowed. So the effect of this  
15 project is to put in place a cap that reduces the  
16 maximum flows allowed in the facility.

17 We picked the number based on an idea of  
18 one, something we could accept; and two, that  
19 would look at it in terms of recent flow levels.  
20 The idea being that if you agreed, and we don't  
21 agree with the position, that the impacts of this  
22 structure are within the scope of this project and  
23 are significant. Thus need to be mitigated. If  
24 you can now say that even if you accepted that  
25 argument flows have not increased.

1                   Then --

2                   UNIDENTIFIED SPEAKER:  No, I'm --

3                   MR. MCKINSEY:  If you're able to say  
4                   that then you're able to actually say that there  
5                   is no increase, even under that argument.  And  
6                   thus there cannot be a CEQA issue; there can't be  
7                   an impact issue being caused by the project.  Even  
8                   using that party's own basis for arguing that  
9                   there was one.

10                  And so the monthly limits, would be nice  
11                  if we could also offer that, is that type of a  
12                  thing where you're eliminating a monthly level  
13                  argument.  The problem is we can't.  They're very  
14                  constraining.  And that's what I was getting at  
15                  with the months numbers.  But that's also the idea  
16                  behind the flow, itself.

17                  PRESIDING MEMBER KEESE:  What's the  
18                  timeline for your application for your new NPDES  
19                  permit?

20                  MR. MCKINSEY:  The existing NPDES  
21                  permit, it's a five-year cycle and so this year we  
22                  need to submit an application in the fall for a  
23                  NPDES permit.  Because of the new regulations  
24                  that's probably going to be in the form of an  
25                  application, a study and then a completion.  And

1 really it's going to be kind of an issue at first  
2 for the Water Board, and so since the Water  
3 Board's going to have to figure out this schedule,  
4 the guess might be that we do the study; and maybe  
5 in the meanwhile we have an interim NPDES permit  
6 that says continue operating while you complete  
7 the study.

8 And then when we get the study results  
9 we propose, or they order one way or another, how  
10 you're going to comply with the new regulations  
11 implementing technologies.

12 And a study takes a year of data  
13 collection and on the order of a half a year to  
14 collect. And depending on who's involved it takes  
15 awhile to develop how you're going to do the  
16 study. So it's a two-year type of undertaking.

17 So if we started that in the fall then  
18 we're looking at the fall of 2006 for the study  
19 being completed and the changes being implemented.  
20 And interestingly these obviously come along while  
21 construction is underway. Of course, things can  
22 slow down the progress and getting studies  
23 accomplished. And so in an ideal world that's  
24 where we would be.

25 I think I addressed the biology

1 questions. One other comment I'd like to make,  
2 and I'm not sure, we haven't decided whether we  
3 want to submit any written comments adding to the  
4 record or not, but having read the parties'  
5 comments there's one thing I would indicate.

6 And that is regardless of the big  
7 picture as it's being described by other parties,  
8 the agency that's responsible for permitting the  
9 cooling system in California is the Regional Water  
10 Board. And they implement both state and federal  
11 law. They're a state agency with delegated  
12 federal authority. And they're thus the  
13 responsible agency for permitting and regulating  
14 the intake system.

15 And the Water Board has allowed the  
16 cooling system and has even indeed said that this  
17 project doesn't require a change to the permit.  
18 Thus, this existing permit allows us to continue  
19 to operate cooling systems for the new project.  
20 And thus the one agency that's responsible for  
21 protecting the aquatic ocean environment here has  
22 said that we have the ability to proceed with this  
23 project in terms of impacts.

24 There are other comments that have been  
25 received by individuals. Often they're employees

1 of agencies. The only thing that you may be able  
2 to describe as being a comment from an agency  
3 would be the letters, sometimes called findings,  
4 sometimes called reports by the California Coastal  
5 Commission.

6 However, no other agency has made any  
7 agency decisions on this project. And, indeed, if  
8 they tried we may have pointed out they didn't  
9 have jurisdiction or authority that would give  
10 them that.

11 As to the Coastal Commission, and I need  
12 to restate this, the Coastal Commission has  
13 participated, at least an individual from the  
14 Coastal Commission, Tom Luster, who is on the  
15 phone, has participated in this proceeding, and  
16 mostly by phone, attending a few of the workshops  
17 occasionally.

18 The Coastal Commission apparently, and I  
19 say apparently for a very important reason, voted  
20 at Coastal Commission hearings on something that  
21 they called findings. And now, I think, are being  
22 called reports corresponding to the Warren Alquist  
23 Act section number that requires them to submit a  
24 report.

25 We have not been asked to, nor have we

1 participated or been aware of any type of schedule  
2 for those, and so we would say that the Coastal  
3 Commission's statements are indeed that. They're  
4 statements that have some effect, less than that  
5 of a finding under administrative law.

6 And we think that's very important to  
7 understand, not just from the legal perspective,  
8 but that we've never had a Coastal Commission  
9 biologist give us an opportunity to ask them what  
10 their basis was to have a dialogue with them.

11 The Energy Commission has provided  
12 actively participating biologists who have allowed  
13 us to understand their positions and where they  
14 come from. The Coastal Commission has been a one-  
15 sided production of comments, and a representative  
16 who was not a biologist, but really a provider of  
17 comments from others apparently at the Coastal  
18 Commission.

19 So we don't think that there is anything  
20 whatsoever wrong, both legally and factually, with  
21 the degree to which you've evaluated the Coastal  
22 Commission's comments, considered them and looking  
23 at the evidence that was presented in this record,  
24 issued the decision you've issued.

25 And thus we, as an applicant, who are

1 the ones who should care tremendously about the  
2 viability of this project, do not have any  
3 concerns about the compliance of this project with  
4 the California Coastal Act.

5 PRESIDING MEMBER KEESE: Thank you. And  
6 you've essentially started to join the issue,  
7 which is, I guess the question would be if the  
8 Water Board -- when the Water Board issues a new  
9 permit that will be the controlling factor on  
10 water use.

11 MR. McKINSEY: Correct.

12 PRESIDING MEMBER KEESE: And in your  
13 opinion cannot be overridden by the Coastal  
14 Commission?

15 MR. McKINSEY: Correct. And the  
16 particular reason is they're an implementing  
17 federal authority.

18 PRESIDING MEMBER KEESE: And cannot be  
19 overridden by the Energy Commission, either.

20 MR. McKINSEY: Right. The --

21 PRESIDING MEMBER KEESE: Thank you. All  
22 the parties, including the Coastal Commission,  
23 will be asked to comment on that.

24 MR. McKINSEY: Let me finish our  
25 conditions.



1           PRESIDING MEMBER KEESE:   Sure.

2           MR. MCKINSEY:   And I'm only going to  
3   indicate a couple of emphasis on a couple of  
4   conditions that we felt -- well, I don't even know  
5   if I need to indicate that.   We indicated where we  
6   recommended changes to the conditions.   I don't  
7   think very many, if any, of them will turn out to  
8   be contentious.

9           Many of them were where we looked at the  
10   record and we said, aha, looks like we got a word  
11   that wasn't what we agreed to here.   We certainly  
12   respect the Committee's responsibility to not just  
13   do what the parties agreed to, but to look at the  
14   totality of the record and say, here's what we're  
15   ordering --

16          PRESIDING MEMBER KEESE:   As Mr. Shean  
17   indicated, that electronically we were working out  
18   of a document that we wished we'd had the final  
19   electronic version to be working off of.   So, --

20          MR. MCKINSEY:   Well, and one of the  
21   issues was --

22          PRESIDING MEMBER KEESE:   -- most of  
23   those were inadvertent, and we're going to -- do  
24   you want to -- at what time are we going to take  
25   those up?

1 HEARING OFFICER SHEAN: Well, we're sort  
2 of going through them as each party speaks, so  
3 that --

4 MR. McKINSEY: I would indicate really  
5 one of the things that's been difficult is we  
6 haven't had a single document because we were  
7 working as a work in progress throughout last fall  
8 and through the evidentiary hearings, making  
9 agreements, agreeing on things. And so there was  
10 never a single place where you could go and say  
11 here's everything.

12 And even when we thought we'd  
13 accomplished those, we went on to adjust and find  
14 mistakes. And I think the comments that have been  
15 received by us and the other parties are going  
16 to --

17 PRESIDING MEMBER KEESE: Somebody on the  
18 phone is interrupting our proceeding here. Again.  
19 On cue you did it again.

20 MR. McKINSEY: And thus we think that  
21 the comments by the parties show that we're going  
22 to get there in terms of sorting that out.

23 PRESIDING MEMBER KEESE: Okay.

24 DR. REEDE: If you're on the phone would  
25 you please put your phone on mute until it's time

1       for you to speak. It would be appreciated by all  
2       those here in the proceeding. Thank you.

3               MR. MCKINSEY: So, with that, I think  
4       that's all we really need to say. I think we can  
5       hear from other parties and obviously -- the only  
6       thing I was asking about this procedure is if you  
7       wanted to do two rounds where the parties can  
8       present their comments and then indicate everyone  
9       else's concurrence on those.

10              HEARING OFFICER SHEAN: Let's just see  
11       how this develops. I think the intention of the  
12       Committee is we're going to take the comments on  
13       the conditions and attempt to draft in a final  
14       set. And that will be published with enough  
15       advance availability to the parties so that  
16       they'll have a fair idea of what it is that we  
17       believe represents the final version based upon  
18       everything we've heard here today.

19              And should there be the necessity in the  
20       mind of any particular party to comment further,  
21       that opportunity will be available to them, either  
22       to the Committee or to the full Commission.

23              Is that everything, Mr. McKinsey?

24              MR. MCKINSEY: That's complete.

25              HEARING OFFICER SHEAN: All right.

1 Mr. Abelson.

2 MR. ABELSON: Thank you, Officer Shean.  
3 Commissioner Keese, Advisors, Officer Shean, first  
4 of all I want to start off by thanking the  
5 Committee and the Commissioner, in particular, for  
6 affording us this opportunity to present staff's  
7 views with regard to the PMPD.

8 The way I'd like to proceed if it's  
9 acceptable to the Committee and to Officer Shean,  
10 is Terry O'Brien, the Deputy Division Chief, would  
11 like to present a brief statement representing the  
12 Division, overall.

13 I have a number of specific comments on  
14 the biological resource issue that I'd like to  
15 summarize for the Committee. And then Dr. Reede,  
16 the Project Manager for this project, has  
17 meticulously gone through the conditions of  
18 certification and can talk about any of those that  
19 you wish that don't relate directly to the  
20 biological resource area.

21 So, if that's acceptable I would ask Mr.  
22 O'Brien if he would present his statement.

23 MR. O'BRIEN: Good afternoon, Chairman  
24 Keese, Hearing Officer Shean and Chairman Keese's  
25 Advisers. My name is Terry O'Brien; I'm the

1 Deputy Director of the Energy Commission's System  
2 Assessment and Facilities Division.

3 I would like to make a few opening  
4 comments on behalf of the Energy Commission Staff  
5 before Mr. Abelson, as he indicated, and Dr. Reede  
6 provide staff's specific comments on the Presiding  
7 Member's Proposed Decision.

8 First, let me emphasize that the staff  
9 does not oppose the licensing of the El Segundo  
10 project if properly conditioned. We understand  
11 the need for additional sources of generating  
12 capacity and are cognizant of the benefits of  
13 building generation near the load source, and the  
14 benefits of replacements/repowerings at existing  
15 power plants, as opposed to the development of  
16 greenfield sites.

17 Our substantive disagreements with the  
18 PMPD are limited to one technical area, biological  
19 resources. But our disagreements in this area are  
20 significant. We note that the PMPD has rejected  
21 not only the testimony and recommendations of the  
22 Energy Commission Staff on biological resources  
23 mitigation, but three other governmental agencies  
24 entrusted with the responsibility to protect the  
25 environmental resources of Santa Monica Bay, and

1 two public interest intervenors.

2 We believe the unanimity of agreement on  
3 the part of these entities and agency experts, as  
4 expressed in their testimony, provides compelling  
5 reasons for modifying the PMPD.

6 In looking at coastal power plant  
7 projects that the Energy Commission has approved  
8 in the last few years or are currently under  
9 review, we note that this case is inconsistent  
10 with the decisions made by the Commission on these  
11 other projects.

12 For example, at Moss Landing the  
13 Commission required a mitigation package of \$7  
14 million; while at Morro Bay the PMPD is deferring  
15 to the Regional Board on the issue of mitigating  
16 impacts to aquatic biological resources.

17 The Regional Board Staff and Duke are  
18 both proposing \$12.5 million in mitigation; plus  
19 the Regional Board Staff is recommending  
20 administrative charges over the life of the  
21 project that will total about \$5 million.

22 Even on Huntington Beach, which was  
23 fast-tracked because of the energy crisis, the  
24 Commission required \$1.5 million for a biological  
25 study and held in abeyance a determination on the

1 amount of mitigation funds that would be required  
2 pending the outcome of the study.

3 The PMPD establishes a different  
4 standard for this project. We also note that  
5 while the applicants for both Huntington Beach and  
6 El Segundo submitted the same 1970s biological  
7 data from other distant power plants, the  
8 conclusion the PMPD reached in El Segundo is  
9 different than the conclusion the Energy  
10 Commission reached in deciding Huntington Beach.

11 On Huntington Beach the Commission said  
12 that rather than rely on an extrapolation of 1970s  
13 data from other coastal power plants, AES will  
14 conduct a one-year entrainment and impingement  
15 study to assess current project and potential  
16 cumulative impacts.

17 Staff does not understand why the  
18 applicant and El Segundo does not also have to  
19 prepare an entrainment and impingement study to  
20 determine project impacts and appropriate  
21 mitigation enhancement and restoration consistent  
22 with other coastal power plants reviewed by the  
23 Energy Commission in the last few years.

24 In addition to not being consistent with  
25 other projects on the protection of marine

1 biological resources, staff believes that a  
2 Commission decision based upon the PMPD could be  
3 legally vulnerable, and we urge changes to correct  
4 these vulnerabilities.

5 Finally, I would note that staff takes  
6 exception to what it believes are inconsistent and  
7 unfounded accusations in the PMPD criticizing  
8 staff for arbitrarily delaying the review of the  
9 project.

10 Thank you.

11 PRESIDING MEMBER KEESE: Thank you, Mr.  
12 O'Brien. The question of the relationship, you  
13 recognize that there is going to be a study in  
14 conjunction with the new NPDES permit done by the  
15 applicant?

16 MR. O'BRIEN: Yes, we are aware of that.

17 PRESIDING MEMBER KEESE: How would you  
18 suggest that we interrelate that study? Have you  
19 asked for essentially the same thing?

20 MR. O'BRIEN: Well, I'm not familiar  
21 with the aspects of the study that the Regional  
22 Board would require. I think, and Mr. Abelson can  
23 respond after I'm done responding, that one of our  
24 concerns is that the Energy Commission is relying  
25 on a study that will be completed post-



1 certification and outside of the jurisdiction of  
2 this Commission. Therefore, we have concerns with  
3 that approach.

4 PRESIDING MEMBER KEESE: If the  
5 supposition that people have at this time as to  
6 what is going to be required in this new NPDES  
7 permit, is we're going to be talking about a  
8 significant reduction in entrainment and  
9 impingement, is that what you're looking for?

10 MR. O'BRIEN: Well, staff would  
11 certainly welcome the fact that entrainment and  
12 impingement could go down. But staff is also  
13 concerned about the nexus between what the project  
14 impacts are and what mitigation should be for this  
15 project. And we believe that a study is needed to  
16 ascertain what the biological baseline is, if you  
17 will. And that based upon that study then a  
18 determination can be made as to what is needed to  
19 restore and enhance certainly per the Coastal Act.

20 PRESIDING MEMBER KEESE: Okay, and  
21 staff's current position on what baseline is  
22 today? Should we wait for that or -- I mean are  
23 you picking --

24 MR. O'BRIEN: Well, yes. You know,  
25 we've made the point, and once again, staff

1       counsel can add to this, is that we have concerns  
2       about the use of data from distant sources that is  
3       more than, I believe, 25 or 30 years old. And we  
4       believe that the situation has changed in the  
5       immediate vicinity of the project, Santa Monica  
6       Bay, if you will; and therefore, we have  
7       supported, I believe from the onset of this  
8       proceeding, the need for up-to-date studies to  
9       determine what the baseline is.

10               PRESIDING MEMBER KEESE: Recognizing, as  
11       the applicant pointed out, that was it the year  
12       2000, their permit was extended, and at that time  
13       it was found that the volumes were acceptable?

14               MR. O'BRIEN: Chairman Keese, I'm not  
15       sure I can respond to that.

16               PRESIDING MEMBER KEESE: Okay, well, we  
17       can hold that. I think that's an issue here  
18       eventually. Thank you, Mr. O'Brien. We do  
19       apologize for the perceptions of tone in this. We  
20       will be working at a new draft and I trust will  
21       resolve old controversies.

22               MR. ABELSON: Commissioner Keese,  
23       Advisers, Officer Shean, first of all I want to  
24       begin by expressing my appreciation to the  
25       applicant, to the Committee, to Officer Shean for

1 the extensive amount of work that has been done on  
2 this case over a number of years. This is a  
3 project that staff believes can and should  
4 eventually be licensed. This is a project where  
5 issues that have been contentious in many respects  
6 have been worked out.

7 But as Mr. O'Brien has just indicated,  
8 there are significant disagreements with the PMPD  
9 and with the applicant on the issue of biological  
10 resources because in staff's view the applicant's  
11 position, which is largely embodied in the ruling  
12 of the PMPD, is contrary to precedents at the  
13 Energy Commission; is contrary to the law, as we  
14 understand it; and perhaps most importantly, is  
15 unnecessary from the standpoint of protecting the  
16 environment on the one hand, while providing  
17 California's energy needs on the other.

18 I'd like to briefly summarize the key  
19 concerns we have in each of these areas. With  
20 regard to the unprecedented aspects of the PMPD  
21 there are four areas where we note a divergence  
22 from past Commission practice.

23 The first is in the area of the  
24 scientific reports that Mr. O'Brien spoke about.  
25 Before I talk a little further on that let me just

1 back up for a moment and indicate that Mr.  
2 McKinsey has acknowledged that this project is  
3 going to take what he calls a large bucket of  
4 water out of Santa Monica Bay.

5 That large bucket of water is 139  
6 billion gallons a year, enough to cover the City  
7 of Los Angeles a foot deep in water each year. It  
8 is indeed a lot of water.

9 And in the process of doing that it will  
10 entrain, impinge or otherwise destroy trillions,  
11 trillions of marine organisms that currently live  
12 in Santa Monica Bay. And it will do that each  
13 year.

14 Santa Monica Bay is a body of water that  
15 is in serious ecological decline. And a large  
16 number of the species that live in it will be  
17 affected directly by this power plant.

18 With that setting in mind, this is the  
19 context in which we're looking at this project,  
20 there are, as I indicated, at least four  
21 unprecedented aspects to the PMPD.

22 The first is that no reliable science  
23 has been reviewed by the Committee or required by  
24 the PMPD, itself. As Mr. O'Brien noted, the  
25 Energy Commission has required scientifically

1 reliable entrainment and impingement studies for  
2 every other once-through cooling project that this  
3 agency has recently licensed, including the  
4 Huntington Beach case, which was done under  
5 emergency orders from the Governor at the peak of  
6 the energy crisis.

7           The El Segundo case, as the PMPD  
8 currently has it, would be completely  
9 unprecedented if licensed without requiring any  
10 reliable science to justify the Energy  
11 Commission's decision in this matter.

12           A second area that is unprecedented,  
13 based on our review of the history of the agency,  
14 is that no meaningful mitigation has been required  
15 in this case. Instead the PMPD, in its current  
16 form, has accepted the applicant's proposal to,  
17 number one, cap the cooling water withdrawal rates  
18 at levels that are far above the rates that are  
19 actually being withdrawn at that site today as we  
20 speak. They will increase the withdrawal rates  
21 above existing conditions.

22           Number two, the PMPD proposes to do a  
23 Gunderboom or Gunderboom-like study, but none of  
24 the concerned agencies have recommended that this  
25 technology be considered in this case, or has

1 particularly supported the need or desirability  
2 for such a study, given the open ocean nature of  
3 the environment in which we're dealing.

4 Third, the PMPD accepts the applicant's  
5 proposal to pay a million dollars to the Santa  
6 Monica Bay Restoration Commission. But this  
7 amount, this million dollars, is an amount that is  
8 far below the evidence in the record which shows  
9 that in the case of the San Onofre Nuclear  
10 Generating Facility 50 to 80 million was what was  
11 necessary to mitigate for entrainment and  
12 impingement impacts; 67 million was required for  
13 cooling system improvements and mitigation in the  
14 Moss Landing case; and 37.5 million was required  
15 for similar work, and was both proposed and  
16 accepted by Duke Energy in the Morro Bay case. So  
17 a million dollars is just far below the number of  
18 dollars that we have been finding in other cases  
19 where there are serious entrainment impacts.

20 The PMPD in the third area of precedence  
21 rejects the recommendations of every other natural  
22 resource protection agency that has participated  
23 in this case, including the Coastal Commission,  
24 the Department of Fish and Game and the National  
25 Marine Fisheries Service. Staff is unaware of any

1 other Energy Commission case that has rejected the  
2 unanimous recommendations of all of the agencies  
3 who testified in the proceeding.

4 Finally, in the area of precedence the  
5 PMPD appears to rely substantially on speculative  
6 future actions of other agencies, specifically,  
7 and contrary to the law in California, the PMPD  
8 cites the future actions of the Los Angeles  
9 Regional Water Quality Control Board as part of  
10 the basis and part of the justification for the  
11 decision. Staff knows of no other Energy  
12 Commission case in which this sort of speculative  
13 future action has become a foundation for the  
14 decision.

15 Now, in addition to these unprecedented  
16 aspects of the PMPD, there are several aspects  
17 which, from staff's perspective, appear to be  
18 unlawful. These fall into two broad categorical  
19 areas, the first involving the California  
20 Environmental Quality Act or CEQA, or the  
21 functional equivalent responsibilities that the  
22 Energy Commission has under CEQA. And the other  
23 is in the area of the Warren Alquist Act as it  
24 interrelates with the California Coastal Act.

25 PRESIDING MEMBER KEESE: Mr. Abelson,

1 before you enter into that line --

2 MR. ABELSON: Sure.

3 PRESIDING MEMBER KEESE: -- can I ask  
4 you a couple questions on the others?

5 MR. ABELSON: Sure.

6 PRESIDING MEMBER KEESE: You're  
7 suggesting that even if we found that there was no  
8 additional impact from the continuation of taking  
9 water for cooling that there should be mitigation?

10 MR. ABELSON: Well, I think we're  
11 suggesting a couple things. First of all, we're  
12 suggesting that there are four particular areas  
13 where this PMPD diverges what we've done in the  
14 past, but --

15 PRESIDING MEMBER KEESE: Right, no, I  
16 understand --

17 MR. ABELSON: But in particular, we  
18 are --

19 PRESIDING MEMBER KEESE: But, but -- if,  
20 you know, if we bought 111 --

21 MR. ABELSON: Right.

22 PRESIDING MEMBER KEESE: -- which is  
23 what -- I think staff is at 126, we were at 139,  
24 there's a suggestion of 101, let's take the lowest  
25 number for --



1 MR. ABELSON: All right.

2 PRESIDING MEMBER KEESE: -- my  
3 discussion purpose here.

4 MR. ABELSON: Sure.

5 PRESIDING MEMBER KEESE: If we decide  
6 it's 101, --

7 MR. ABELSON: Okay.

8 PRESIDING MEMBER KEESE: -- should there  
9 still be a mitigation pool?

10 MR. ABELSON: I understand your question  
11 and let me answer it this way. I'm about to go  
12 off on the legal issues which go to that, so I may  
13 repeat myself in just a moment, but there are two  
14 different sets of laws at the core that the agency  
15 needs to satisfy in this effort.

16 The first is the requirements that CEQA  
17 poses, to create no additional significant adverse  
18 impacts beyond what exists at the time of the  
19 permit. And under the question that you've posed  
20 to me, staff accepts the notion that if the cap is  
21 correctly fashioned, that you could maintain the  
22 baseline. And therefore not increase the impacts  
23 beyond what is currently occurring at the site.

24 Therefore, if you did that, the  
25 requirements of CEQA would be met.

1           PRESIDING MEMBER KEESE: And no  
2 additional -- no mitigation would --

3           MR. ABELSON: Under CEQA.

4           PRESIDING MEMBER KEESE: CEQA, okay.

5           MR. ABELSON: All right. However, there  
6 is a second line of law that's highly important to  
7 this case. In fact, in many respects may actually  
8 be dispositive in this case. And that is that  
9 this project is in the California coastal zone,  
10 and therefore subject to the California Coastal  
11 Act, and therefore is subject to the requirement  
12 in that Act that projects going ahead in the  
13 coastal zone are required to restore and enhance,  
14 to the extent feasible, marine resources, They're  
15 also required to minimize the impacts of  
16 entrainment to the extent feasible.

17           If I could focus just on the restore and  
18 enhance piece for a moment, because I think it  
19 goes directly to the question you're asking, --

20           PRESIDING MEMBER KEESE: Yeah, what is  
21 the baseline from which we start?

22           MR. ABELSON: Okay. If the baseline  
23 were satisfied in terms of the cap for CEQA  
24 purposes, that is to say the project is not making  
25 the situation any worse, the California Coastal

1 Act does not stop at that point. There is a  
2 second law. And it says, if you're seeking  
3 permission from the State of California to build a  
4 project, to operate a project in the coastal zone,  
5 and there's no dispute that this one is in the  
6 coastal zone, you must do more than simply  
7 maintain the existing situation as you might under  
8 CEQA.

9 You must go further; you must restore  
10 and enhance the marine resources affected by your  
11 project to the extent feasible. So there is that  
12 qualifier. It's not an unlimited requirement, but  
13 there is an obligation to make it better, not just  
14 don't make it worse.

15 I don't know if that answers your  
16 question or not.

17 PRESIDING MEMBER KEESE: And that's the  
18 point at which you have determined that a million  
19 dollars to Santa Monica and a Gunderboom are not  
20 adequate mitigation; it should be some larger  
21 number?

22 MR. ABELSON: Well, I think that that is  
23 correct. It does relate to the restore-and-  
24 enhance issue, there's no question about it. But  
25 it also relates, in our judgment, to the CEQA

1 issue at the moment, because of staff's --

2 PRESIDING MEMBER KEESE: I thought we  
3 disposed of the CEQA issue.

4 MR. ABELSON: Well, we did in part  
5 because of the way you asked the question. But,  
6 in fact, I was about to go into that. Could I  
7 proceed with that issue as I was going to present  
8 it, and then I think it explains --

9 PRESIDING MEMBER KEESE: Okay.

10 MR. ABELSON: -- will explain what I'm  
11 concerned about.

12 So, in addition to these precedent  
13 problems that we have, we're also concerned about  
14 whether or not the PMPD is, in effect, not in  
15 compliance with the law. And the law, as I've  
16 indicated, has two aspects. One is CEQA, one is  
17 the Coastal Act and its relationship to the Warren  
18 Alquist Act.

19 With regard to CEQA we believe the PMPD  
20 is failing CEQA, in effect is allowing an increase  
21 in four different respects. First of all, the  
22 PMPD has rejected what the CEQA guidelines  
23 describe as the normal baseline that is to be used  
24 in CEQA cases. The guidelines expressly state  
25 that when an agency is reviewing a project under

1 CEQA the baseline is normally the physical  
2 conditions that exist at the facility at the time  
3 the AFC was filed.

4 In this particular case, if we were to  
5 use that normal baseline the volumes of  
6 entrainment water at that facility in December  
7 2002 when the AFC was filed, were 127 billion  
8 gallons per year. And as you know, the PMPD  
9 authorizes 139 billion gallons per year,  
10 approximately a 10 percent increase under CEQA.

11 So, we are concerned that the decision  
12 is not following the normal baseline; and that  
13 concern is heightened further by the fact that in  
14 every other case that we're aware of in recent  
15 times the Energy Commission has used that five-  
16 year baseline that ended at the time the AFC was  
17 filed. And for some reason we're not doing it in  
18 this case.

19 Now, a second problem is that the PMPD  
20 not only doesn't use the normal baseline, it  
21 ignores the facts that exist at the site today.  
22 And that existed at the site before the  
23 evidentiary hearings even began in this case. And  
24 what I'm referring to specifically in that regard  
25 is that on January 1st of 2003, the air quality

1 permits for Units 1 and 2 expired. The applicant  
2 had options available to, I think, retrofit with  
3 best available control technology. They chose not  
4 to do that, and under the terms of their permit,  
5 those facilities have not been operating for  
6 almost 14 months at this point.

7 When they stopped operating whatever  
8 they were drawing in for cooling water went from  
9 whatever it was to zero. And it remains, for  
10 cooling water purposes, at zero today. There is  
11 no cooling water being withdrawn for Units 1 and  
12 2, at least not lawfully, as far as I know.

13 So the PMPD rejects the normal baseline  
14 of the AFC filing date, but then chooses not to  
15 use the actual zero baseline that is part of what  
16 exists at the site today. And the reasoning --

17 PRESIDING MEMBER KEESE: But you're  
18 still okay with -- staff is still okay with the  
19 127 --

20 MR. ABELSON: No. I think staff's view  
21 is that the proper baseline for this case is zero.  
22 That facility is not operating out there today.  
23 It is not causing harm today. And if we were to  
24 start back-pedaling to the energy crisis period,  
25 or even to the AFC filing period, which is the

1 127, then we would really be misrepresenting to  
2 ourselves, misrepresenting to the public,  
3 misrepresenting to the spirit and to the letter of  
4 CEQA both, okay, what this project actually is  
5 going to do to the environment.

6 Our belief is that you can use the  
7 intakes from Units 3 and 4, they are ongoing. And  
8 that's how we ended up with 102 billion gallons a  
9 year. But the intake that you should put in for  
10 Units 1 and 2, and in effect the new units that  
11 are now going to replace them, is zero. And that  
12 is actually our recommended position and it has  
13 been.

14 Short of that we believe that choosing  
15 an atypical period, which is what the PMPD has  
16 done, it has picked five years, that's not  
17 unusual. But it has picked the five years that  
18 are not what we normally do, namely the five years  
19 leading up to the AFC. It's picked the five years  
20 that just happen to totally coincide with the most  
21 atypical energy consumption period in California's  
22 history, the very peak of the energy crisis.

23 And it rationalizes that by saying,  
24 well, that later period is more indicative of how  
25 the energy system would operate in a deregulated

1 market. Whereas if we used the five years up to  
2 the AFC we're picking up a few years when we were  
3 still under the regulated system with Edison and  
4 so on.

5 And I guess that's a fair point. But  
6 what staff doesn't understand is if you want to  
7 see what the regulated market's doing, why don't  
8 you go out there and take the baseline that exists  
9 today, which is zero. That's what the regulated  
10 market is doing.

11 PRESIDING MEMBER KEESE: Dereg --

12 MR. ABELSON: I'm sorry, I beg your  
13 pardon, the deregulated.

14 PRESIDING MEMBER KEESE: And you're  
15 suggesting we have a deregulated market today?

16 MR. ABELSON: Well, I'm suggesting that  
17 the PMPD --

18 PRESIDING MEMBER KEESE: If that comes  
19 in it will be a long debate.

20 MR. ABELSON: Yeah. No, what I'm saying  
21 is the PMPD says that it's trying to pick a  
22 baseline --

23 PRESIDING MEMBER KEESE: You're welcome  
24 to take shots at that. It seemed to the Chair of  
25 this Committee, who isn't here, at the time that



1       that was a realistic way to look at it then.

2               UNIDENTIFIED SPEAKER:   At that time.

3               PRESIDING MEMBER KEESE:   And so what I  
4       hear you saying today is, number one, we should  
5       look at precedent because we've always taken the  
6       five years before.   But, maybe precedent is not  
7       quite that important because you don't like what  
8       the Committee did in breaking the precedent, but  
9       you have another suggestion that we should break  
10      with precedent, and now look at it today.

11              MR. ABELSON:   I think it isn't that we  
12      don't like what the Committee did.   It's that  
13      CEQA, and that's what we're talking about, says  
14      that if you're going to interpret CEQA you need to  
15      interpret it liberally to protect the environment;  
16      not restrictively to produce the least protective  
17      baseline, in effect, that you can find.

18              HEARING OFFICER SHEAN:   Well, where  
19      would the 127 come in in your mind?   If it's not  
20      the most and it's not the least, is it legally  
21      sufficient?

22              MR. ABELSON:   I think that staff would  
23      acknowledge that it is legally sufficient.   I  
24      think it is our view that that is what is normally  
25      used, the baseline as of the filing period, the

1       127. If you're going to deviate from the  
2       normal -- and the word normal implies that you are  
3       allowed to, and we're not disputing that, we never  
4       did dispute that you can -- pick a period that  
5       actually is representative of what's going on.  
6       Not something that's, you know, completely unusual  
7       in the way it's set up.

8               The final area of CEQA that we're having  
9       serious legal concerns about is the notion not  
10      only that the annual baseline has not been met  
11      under the proposal in the PMPD, but that CEQA is  
12      seeking basically to insure that you analyze any  
13      adverse impacts the project will have if they  
14      increase the harm that's occurring.

15             An annual count alone, even if we get it  
16      right, by using either the 127, which is normal,  
17      zero baseline, which we think reflects the way  
18      things really are out there today, still leaves  
19      the applicant with the complete flexibility to use  
20      that water any month of the year that it chooses  
21      in any amount that it chooses subject to that  
22      absolute upper limit in its NPDES permit.

23             And those variations would be way above  
24      what has happened historically -- could be way  
25      above what has happened historically on any of the

1 12 months of the year. Why is that important?

2 Why do we care?

3 We care because the undisputed evidence  
4 in this record proves, and no one has disputed  
5 this, that Santa Monica Bay doesn't have fish  
6 spawning only in February, March and April, which  
7 is what the PMPD, in effect, embraces from the  
8 applicant's proposal. There are fish spawning in  
9 Santa Monica Bay every month of the year. That's  
10 the nature of the ecosystem down there.

11 So if you want to maintain the status  
12 quo and not increase the harm that you're causing,  
13 you need to be sure that your levels do not go  
14 above the appropriate monthly baselines in that  
15 area for each month, not just for the three  
16 months.

17 HEARING OFFICER SHEAN: Why would  
18 monthly be sufficient? If you really want to get  
19 down to it, why isn't it daily?

20 MR. ABELSON: I think, Officer Shean,  
21 that's a fair question. I think it is a good  
22 question. I think it's a question that one has to  
23 answer by saying that we cannot let the non-  
24 attainable perfect get in the way of the  
25 attainable good.

1           There's no way to put a day-to-day  
2   microcap on this facility. I don't know that we  
3   even have the records to do that. I mean we  
4   could, if you want to follow the logic train all  
5   the way to the end, you do the five years for 365  
6   days of the year and you find out what the average  
7   was; and you put it -- you say, every day, we're  
8   going to micromanage every single day. It was the  
9   view of staff's biologists, who are the leading  
10   biologists in the country on this topic, it was  
11   their view that a monthly cap would adequately  
12   approximate the cycle that's out there, taking  
13   into account the variability with each species  
14   about when they spawned.

15           PRESIDING MEMBER KEESE: And you are  
16   going to answer our questions later about what  
17   impact that has? I mean you've heard what the  
18   applicant said, their plan would essentially be to  
19   probably shut down --

20           MR. ABELSON: Right.

21           PRESIDING MEMBER KEESE: -- during the  
22   months that --

23           MR. ABELSON: Yeah. No, we will speak  
24   to that issue in just a moment.

25           HEARING OFFICER SHEAN: May I ask a

1 question. Since you have raised the matter of the  
2 consistency with prior decisions, if I understand  
3 correctly, the prior decisions had an annual  
4 average of the five years prior to filing. Did  
5 any of those have essentially the monthly averages  
6 for five years prior to filing?

7 MR. ABELSON: To be honest with you,  
8 Officer Shean, I am not aware of whether they did  
9 or did not. And if they didn't, I'm not sure what  
10 the reasoning was for that. I don't know if the  
11 issue was briefed. I don't know if evidence was  
12 presented. What I know is that in this particular  
13 case the evidence is clear you're not maintaining  
14 the baseline if you aren't doing a monthly cap at  
15 least every month of the year.

16 So then it's not an issue of precedent,  
17 it's an issue of evidence in part in this case.  
18 We have stepped forward on this issue. We've  
19 thought about this issue. We've presented  
20 evidence on this issue. I don't know what was  
21 done in the other cases.

22 HEARING OFFICER SHEAN: So do I  
23 understand that at this point you're saying that  
24 there may not have been spawning fish in the  
25 environment in Moss Landing or Morro Bay?

1           MR. ABELSON: I have no idea whether  
2           there were or not, and I have no idea whether the  
3           evidence showed that they spawned 12 months of the  
4           year. I don't know if the issue was even  
5           addressed evidentially. It may not have been.

6           But it was in this case, so that's, you  
7           know, that's the point.

8           The other area of the law that we're  
9           concerned about, and I've indicated before that  
10          this actually may be the more serious, honestly,  
11          of the two issues, is the question of compliance  
12          with the California Coastal Act and its inter-  
13          relationship with the Warren Alquist Act.

14          Under Public Resources Code section  
15          30413 the California Coastal Commission has  
16          determined that for Coastal Act consistency  
17          purposes a reliable entrainment and impingement  
18          study and related mitigation for restoration and  
19          enhancement consistent with that study, is  
20          required before this project can be licensed by  
21          the Energy Commission.

22          That finding is clear; it is explicit;  
23          and it has been repeated several times by the  
24          Coastal Commission.

25          The PMPD rejects this recommendation;

1       however, it makes no specific finding about the  
2       infeasibility of that which was recommended, which  
3       we're required to do under the Warren Alquist Act.  
4       We can only reject Coastal Commission  
5       recommendations under two grounds. One is that we  
6       determine that they will cause a more adverse  
7       impact than they will improve. The second is that  
8       they are infeasible.

9               In this particular instance the Coastal  
10       Commission has said for Coastal Act consistency we  
11       need the study; we need to find out what harm  
12       we're doing to what species at what time in order  
13       to tell you what we need to do to restore and  
14       enhance to the extent feasible. And until you  
15       have provided us with those things, the study and  
16       the related mitigation for restoration and  
17       enhancement purposes, we can't tell you that this  
18       project is consistent with the Coastal Act. In  
19       fact, we're going to tell you just the opposite.  
20       It is not consistent with the Coastal Act.

21              And the PMPD does not follow the Warren  
22       Alquist Act because it doesn't say, well, we  
23       reject the Coastal Commission's recommendation in  
24       this regard because it's infeasible or it would be  
25       adverse to the environment. It just doesn't say

1 anything of that. It says we're not going to do  
2 it.

3 So, we're very concerned about that as a  
4 legal matter, in terms of the way the decision is  
5 currently written.

6 Also, on the other Coastal Commission  
7 recommendation, which is that the plant could be  
8 licensed and could go ahead now if the applicant  
9 were to use the Hyperion wastewater cooling  
10 alternative. Staff believes that the PMPD has  
11 the, how does the phrase go, the emphasis on the  
12 wrong syllable, that basically the PMPD looks at  
13 certain claims that the applicant has made about  
14 legal problems it may or may not have in getting a  
15 permit for the wastewater cooling alternative.  
16 But does not have substantial evidence in the  
17 record to actually conclude, with substantial  
18 evidence, that that option isn't feasible.

19 So with regard to the Coastal  
20 Commission's recommendation on the cooling option,  
21 our view there is that there is not substantial  
22 evidence to support the finding in the PMPD. With  
23 regard to the study and mitigation recommendation  
24 our views are simply no finding at all that's  
25 legally required.



1           The final thing that I'd like to comment  
2       on, and I guess this goes to the question of the  
3       ability of the project to be operated, is that  
4       staff believes that this decision is not only  
5       unprecedented, quite possibly unlawful, but is  
6       unnecessary. And the reason that we say that is  
7       that we believe from an energy resource  
8       perspective there's a win/win option here.

9           Our caps that we have proposed would  
10      allow this project to be licensed tomorrow, from  
11      staff's perspective, lawfully. If you also put in  
12      the study and all feasible mitigation, whatever  
13      that would turn out to be, and we've given you a  
14      range of numbers that you might want to look at,  
15      you know, in making that evaluation.

16          The counts that we are proposing, and  
17      I'll be happy to go over this with regard to the  
18      specific exhibits that were in the testimony and  
19      are in the briefs so we look at absolute numbers  
20      when you're ready to do that, but the counts that  
21      we're proposing will allow this applicant  
22      somewhere between 240 million gallons of water per  
23      day and 340 million gallons of water per day  
24      regardless of what the study shows.

25          If the study comes back and shows that

1 we don't even need it to be that tight, it can be  
2 loosened further. But that's, you know, the most  
3 restrictive requirement that staff is proposing.

4 At 240 million gallons of water per day,  
5 the evidence in the record, as opposed to the  
6 statements of Mr. McKinsey, which are not  
7 evidence, and if there's going to be any decision  
8 in this case it can't be based on the statement of  
9 counsel, but the evidence in the record  
10 overwhelmingly demonstrates that the new project  
11 can be operated on as little as 150 million  
12 gallons per day; maybe even as little as 100  
13 million gallons per day.

14 So I heard Mr. McKinsey say, as you  
15 know, representation of counsel, we need 200  
16 million just to operate the new plant, and that  
17 doesn't leave us a lot more under those caps. But  
18 the evidence says you need 150, maybe as little as  
19 100. And that leaves you a heck of a lot of  
20 additional water, okay, to operate those residual  
21 two units that they do want to use and reserve for  
22 peaking power.

23 And we're talking about operate the  
24 units, the new units, 24 hours a day, seven days a  
25 week, 365 days a year, combined cycle, full power.

1 No restriction whatsoever. The hit, to the extent  
2 it occurs at all, is on the residual units, the  
3 inefficient ones that remain. And that hit from  
4 the way the evidence in the record presents,  
5 suggests that they could operate as a peaker  
6 anytime they wanted to; as an intermediate and a  
7 baseload much of the time, as well. I'm not  
8 claiming unlimited on intermediate and baseload.

9 So that's, in essence, our position on  
10 the issues. And I'm happy to try to answer, you  
11 know, any additional questions that you all have,  
12 or to turn it over to Dr. Reede on the conditions.

13 PRESIDING MEMBER KEESE: So I guess your  
14 answer, what you're saying is that if we pick the  
15 101 million --

16 MR. ABELSON: 102 is actually -- 102  
17 billion gallons per year.

18 PRESIDING MEMBER KEESE: If we pick the  
19 102 billion, that if we look back at the evidence  
20 that was given by applicant and staff, concurred  
21 numbers, that it could be operated essentially the  
22 new stuff at full operation?

23 MR. ABELSON: Of that there is no  
24 question at all because 102 billion will provide  
25 at least, even with the monthly caps every month

1 of the year, will provide at least 246 million  
2 gallons per day.

3 Let's take Mr. McKinsey's representation  
4 that he needs 200; let's just take that at face  
5 value. We don't accept that, by the way. The  
6 evidence suggests 150 or maybe only 100. But  
7 let's just take his representation of 200.

8 We're proposing 246 million gallons per  
9 day under our most restrictive monthly cap. You  
10 only need 200, you're running 7/24/365 for the new  
11 one, okay. Now, if you did need 200 and you only  
12 had 240, okay, obviously that doesn't leave you a  
13 whole lot left. And we can get into what that  
14 leaves you for the inefficient one that's still  
15 remaining on the site.

16 But to answer your question, there is  
17 nothing in staff's proposal that would in any way  
18 stop the new project from operating 7 days a week,  
19 24 hours a day, 365 full load.

20 DR. REEDE: Excuse me, Chairman Keese.  
21 If I could add, the way that that would occur, the  
22 condenser unit has not been designed for the plant  
23 yet. If you have lower flows you have a larger  
24 condenser, basically you put a larger radiator in  
25 your car.

1 MR. ABELSON: We don't want to get too  
2 much into evidence -- in the record.

3 DR. REEDE: So, if we got --

4 HEARING OFFICER SHEAN: We have the  
5 concept.

6 DR. REEDE: So you have the concept that  
7 you don't need 207 million gallons per day to  
8 operate a plant with this output; you have a  
9 larger radiator, so to speak. So there's more  
10 than adequate water available to operate the new  
11 units and to operate the old units while  
12 stabilizing the impacts on the environment.

13 HEARING OFFICER SHEAN: I have a  
14 question, Mr. Abelson.

15 MR. ABELSON: Yes, sir.

16 HEARING OFFICER SHEAN: How is it your  
17 combined Bio-1, -2 and -3 would satisfy the  
18 Coastal Commission report in your mind?

19 MR. ABELSON: The way that we look at 1,  
20 2 and 3, and its compliance with the Coastal Act  
21 and the other laws is this. The annual and  
22 monthly caps are essential for the CEQA part of  
23 the equation. They're essentially what you would  
24 call our Bio-1. And they're critical for CEQA  
25 compliance.

1           Once you get past that so you're not  
2       making the situation any worse than currently  
3       exists, you still have the obligation under the  
4       California Coastal Act to restore and enhance to  
5       the extent feasible.

6           The way we have offered conditions 2 and  
7       3 is this. Go immediately after licensing and  
8       commence your study because you don't need the  
9       plant to be operating to do it, that's been  
10      established. The study will take about, give or  
11      take, about 15 months to complete, and maybe  
12      another few months for analysis and finalization.  
13      So maybe it takes 20 months. I think the evidence  
14      in the record is about 18 months.

15          The project is anticipated to take about  
16      30 months from licensing to start of operation,  
17      assuming, you know, that they went straight ahead  
18      with the whole. So we would have the information  
19      on what the problem is out there. How many fish,  
20      what species and what times of the year are being  
21      killed long before the project ever started  
22      operation.

23          In addition we're asking the Committee  
24      to require the applicant to put all what we call  
25      feasible funds into a trust account. We discussed

1       this, I remember, Chairman, you engaged us a  
2       little bit at the time of the hearings on this.  
3       We are suggesting that you all require them now to  
4       put the maximum feasible, whatever that may be and  
5       there's evidence concerning what it is and you'll  
6       have to make a decision on that, put it into a  
7       restoration and enhancement trust account now.  
8       It's a trust account.

9               If the study comes in and says the harm  
10       out there is less than -- I'm going to make up a  
11       number for the purposes of discussion -- let's say  
12       that you all conclude that this applicant, who has  
13       talked about Gunderbooms and so on, can afford \$20  
14       million and still have an economically viable  
15       project. So you've ordered them to put \$20  
16       million into the trust account.

17              The study is completed and it says,  
18       whoops, applicant was right all along; there's  
19       actually very little damage that's occurring out  
20       there because the whole area is a dead zone, you  
21       know, for whatever reason that may be. There's  
22       nothing out there. There's no real harm  
23       occurring. The applicant would get all of its  
24       money back.

25              If the study said there is damage but

1       when we look at offsite mitigation we can fix it  
2       for \$10 million. The applicant would get 10 of  
3       the 20 million back.

4               If the study came in and said the damage  
5       out there is unbelievable; it's killing \$100  
6       million worth of mitigation offsite in a year, the  
7       applicant would not owe a penny more than the \$20  
8       million. That's it because that's what you have  
9       determined is the amount feasible.

10              PRESIDING MEMBER KEESE: Well, but if  
11       it's 100 million they're probably going to drop  
12       the project.

13              MR. ABELSON: No, but my point is they  
14       don't owe -- the Coastal Act only requires that  
15       you restore and enhance to the extent feasible.

16              PRESIDING MEMBER KEESE: Okay, so --

17              MR. ABELSON: So even if the damage  
18       is --

19              PRESIDING MEMBER KEESE: -- they get  
20       their \$20 million back, then?

21              MR. ABELSON: If the damage is 100  
22       million, okay, and you've determined that they can  
23       afford the 20, that's your determination, then  
24       that's what they owe.

25              PRESIDING MEMBER KEESE: That's the



1 limit of their --

2 MR. ABELSON: That's it. It won't go up  
3 because you've set the cap. It can actually go  
4 down if the study turns out to determine that we  
5 don't need quite that much.

6 Now, is this the normal way we do  
7 business? No. It is not. And I'm going to be  
8 honest about that. I think I need to be because  
9 you've got several agencies here who would much  
10 prefer that the study be done, completed, and the  
11 mitigation ordered before licensing. And that is  
12 the normal process. We usually measure twice and  
13 cut once. We get the information; then we make  
14 the decision.

15 In this particular situation, because  
16 staff is concerned about the energy needs of the  
17 state, we believe that we can meet the spirit and,  
18 in essence, the letter of the law, okay, by  
19 creating the trust fund and the study after the  
20 fact.

21 To answer your question, Mr. Shean, I  
22 think it is our belief that that would meet the  
23 Coastal Commission's requirement of restoring and  
24 enhancing to the extent feasible. And that's all,  
25 in fact, they really require.

1 HEARING OFFICER SHEAN: Have you talked  
2 to them?

3 MR. ABELSON: I've talked to them  
4 numerous times, of course.

5 HEARING OFFICER SHEAN: Well, have you  
6 talked to them and they have given you a green  
7 light on this?

8 MR. ABELSON: I think that I have --  
9 would want to be careful about how I answer that,  
10 so that I'm not overstating the case or  
11 understating the case. I have not talked to the  
12 Coastal Commission, okay.

13 PRESIDING MEMBER KEESE: Well, we'll let  
14 them answer --

15 MR. ABELSON: They're here, and I think  
16 they can address that best.

17 PRESIDING MEMBER KEESE: Let me ask you  
18 the same question I asked the applicant. This is  
19 an unusual case in that we now know that new rules  
20 are being proposed by the federal government which  
21 will impact this case; which will require a study.

22 Now, how should we take that into  
23 consideration? Should we take it into  
24 consideration?

25 MR. ABELSON: Legally you absolutely

1       should not. I mean I understand that as a policy  
2       matter and as a sort of a matter of kind of  
3       political judgment that's the kind of thing you're  
4       tempted to want to take into consideration.

5               It becomes you sort of know it's out  
6       there and you're kind of wondering, you know, --

7               PRESIDING MEMBER KEESE: Well, we know  
8       it's out there. It just hasn't quite --

9               MR. ABELSON: Well, but the problem is  
10      you don't, number one, we have our requirements  
11      under the Coastal Act, our requirements of the  
12      Warren Alquist Act, we have requirements under  
13      CEQA.

14              What the EPA, who has been sued three  
15      times by the Water Alliance of which Santa Monica  
16      Baykeepers is a member, what EPA's final rules  
17      will look like, what the courts are going to  
18      uphold, what the Los Angeles Regional Water  
19      Quality Control Board is going to interpret those  
20      rules to mean at some point in the future, is as  
21      uncertain as to who's going to win the  
22      presidential election in 2008. We don't know. We  
23      really don't know.

24              And the one thing that we do know is  
25      that in, I believe this is true for the new

1 facilities, an I'd like to qualify this by saying  
2 subject to check, I believe that they said that  
3 any studies that were required under those rules  
4 could be back-dated as far as five years from the  
5 date of the date of the NPDES and still be  
6 considered valid.

7 So, to get to your point, if we put the  
8 right caps on for CEQA reasons, require the study  
9 and the related mitigation for restore and enhance  
10 reasons, it's not as if we're asking the applicant  
11 to bring us a rock in terms of the NPDES permit.  
12 I mean that study is going to be done undoubtedly  
13 in coordination with the Los Angeles Board, with  
14 the Coastal Commission, based on what I believe is  
15 the requirement for new facilities. It's going to  
16 be a grandfathered study that, in effect, if it's  
17 done properly will be acceptable for NPDES  
18 purposes, as well.

19 PRESIDING MEMBER KEESE: You've pretty  
20 well dismissed the Gunderboom idea as being  
21 beneficial at all?

22 MR. ABELSON: Well, I don't personally,  
23 I'm not a scientist, so you know, it's not a  
24 matter of what I think. What I know is what's in  
25 the record and what's in the record is that no

1 public agency recommended it; no public agency  
2 supported it.

3 We had a sales person who was brought in  
4 unbeknownst to staff to make a sales pitch during  
5 the hearings. There was no prefiled testimony of  
6 any kind that we could even cross-examine on.  
7 There have been serious problems with the  
8 Gunderboom technology in many applications; and  
9 these are viewed, based on the evidence in the  
10 record, as being extremely likely to be the case  
11 in an open-water environment like Santa Monica  
12 Bay.

13 PRESIDING MEMBER KEESE: If -- let's  
14 posit first, and I don't really want to limit this  
15 to the Gunderboom, but let's say the Gunderboom or  
16 another technique listed by EPA in their new rules  
17 reduces the entrainment and impingement by say 10  
18 or 20 percent. Should we condition our decision  
19 and say that the applicant can take an additional  
20 10 or 20 percent of flow?

21 MR. ABELSON: I think quite honestly,  
22 Chairman, that I don't think we have evidence in  
23 the record that allows that conclusion at this  
24 point. I think if it's an issue that you're  
25 concerned about and are contemplating in some

1 sense that we would actually need to probably  
2 reopen on that to find out what people think.

3 PRESIDING MEMBER KEESE: So, we're not  
4 making a decision that says we're going to allow a  
5 certain amount of flow because it directly has  
6 results in entrainment and impingement, and that  
7 entrainment and impingement is what we're  
8 concerned about, not necessarily the flow.

9 So our decision should deal with  
10 entrainment and impingement --

11 MR. ABELSON: Well, I think that's  
12 correct, but as Mr. McKinsey acknowledged,  
13 basically, traditionally, historically, factually  
14 on the evidence in this record, I mean the  
15 entrainment and impingement effects are directly  
16 correlated with your flow levels.

17 PRESIDING MEMBER KEESE: Unless you use  
18 a better technique of --

19 MR. ABELSON: If you can, but the only  
20 one that anybody knows about that has been  
21 discussed in this case was the information  
22 concerning the Gunderboom.

23 PRESIDING MEMBER KEESE: Okay, thank  
24 you.

25 HEARING OFFICER SHEAN: I just have a

1 couple questions. With respect to the  
2 relationship between the federal Clean Water Act  
3 as administered by the local water board, and the  
4 California Coastal Act, in your opinion can there  
5 be Coastal Act requirements that go beyond the  
6 requirements of the Clean Water Act and the NPDES  
7 permit, beyond what's provided for by the federal  
8 government? Or at least in executing the  
9 federalized function?

10 MR. ABELSON: I think the best source  
11 for an opinion on this would be the Coastal  
12 Commission, itself. But let me offer a couple of  
13 observations.

14 One, the NPDES permit and the issues  
15 that we've been talking about are primarily  
16 concerned with whether or not you're applying best  
17 available control technology under the 316B rules  
18 for existing facilities.

19 The question of whether or not you're  
20 meeting state law under CEQA, or meeting state  
21 law, as has been approved by the federally  
22 approved Coastal Act for coastal zone development,  
23 are additional requirements that yes, you do have  
24 to go through; that's my belief.

25 HEARING OFFICER SHEAN: So is it your

1 opinion then that federal law, for example, with  
2 respect to the 316B which is to determine, to some  
3 degree, and minimize the extent of entrainment  
4 impacts by using the best technology available,  
5 that a determination of that by the water board,  
6 and the requirements to meet it could have stacked  
7 up on top of it a requirement under the California  
8 Coastal Commission to further reduce entrainment  
9 impacts?

10 MR. ABELSON: Yeah, no, I think that's -  
11 - that's my reading of the law. The federal law  
12 has certain requirements that you need to satisfy.  
13 Having satisfied those doesn't necessarily mean  
14 that you've met all the legal requirements that  
15 are required in this case.

16 And I would also want to defer again to  
17 the Coastal Commission's, you know, perception on  
18 that issue, as well.

19 HEARING OFFICER SHEAN: Okay. One other  
20 question. With respect to the provisions of  
21 Public Resources Code 25523(d), I think it is,  
22 which is the one about using the provisions of the  
23 30413 report from the Coastal Commission --

24 MR. ABELSON: Yes.

25 HEARING OFFICER SHEAN: -- do you have



1 an opinion as to whether or not that replaces the  
2 requirements of findings for 25525 with respect to  
3 the Coastal Commission? Is that a more specific  
4 override, if you will, and therefore obviate the  
5 need for 25525?

6 MR. ABELSON: It's a very important  
7 question; it's a very timely question. It's one  
8 that I can tell you, as a matter of fact, the  
9 legal office and my colleagues who are involved in  
10 other cases that are in front of the agency right  
11 now which related issues are being discussed, my  
12 colleagues and I have had a number of discussions  
13 about that question.

14 I think it is absolutely the case that  
15 you must satisfy 25523(b), I believe it is if I  
16 remember the section correctly. The question that  
17 is still open, I think, is if you satisfy it by in  
18 fact determining that the Coastal Commission's  
19 recommendations are unfeasible or will create  
20 greater environmental harm, so you're now using  
21 the standards that are in that section, but you're  
22 using the standards to reject, okay, the  
23 recommendations that the Coastal Commission has  
24 made.

25 The question that remains after that is

1 well, okay, the Coastal Commission's told us that  
2 if we don't do X, Y and Z, we're not consistent  
3 with the Coastal Act. We've now looked at  
4 25523(b), and using the standards in that section,  
5 determined that whatever they're recommending is  
6 not feasible. So we're not going to do it.

7 Now, the question becomes well, is this  
8 project now inconsistent with the Coastal Act,  
9 okay, because the recommendations were not  
10 adopted. And therefore you have to go to 25525,  
11 Officer Shean, to address whether or not when you  
12 are inconsistent with a law, okay, there's a  
13 compelling public interest override in any event.  
14 You know, the second half of the test.

15 I think I would like to leave it that  
16 that's a fair question and an open question. I  
17 haven't briefed it obviously for this PMPD. It is  
18 an issue that is being discussed in other cases in  
19 front of the Commission right now. And certainly  
20 I'd be prepared to brief on the issue if it's --

21 HEARING OFFICER SHEAN: Looking at page  
22 12 of your filing, I'm trying to understand under  
23 paragraph D, when it says PMPD rulings are  
24 unnecessary from an energy resource perspective.  
25 Should this be read -- or let me say, was it

1 intended to be read as an assertion that this  
2 facility is not needed for the public convenience  
3 and necessity?

4 MR. ABELSON: No, just the opposite.  
5 What we're saying, as I explained to the Chairman  
6 a moment ago, is that what we view as these  
7 unprecedented and arguably unlawful rulings are  
8 unnecessary even if you're concerned, as we all  
9 are, about keeping the lights on in California.

10 This project and the recommendations  
11 that we're proposing aren't going to turn any  
12 lights off. We're going to let this project run  
13 24/7/365, and then some for Units 3 and 4.

14 So when we're saying unnecessary we mean  
15 it in the sense that you don't have to do these  
16 other things that we view as unusual or  
17 inappropriate. You don't have to do that in order  
18 to keep the lights on. There is a win/win here.  
19 It may be a little bit financially painful to the  
20 applicant, I mean I think we should be honest  
21 about that. The applicant's certainly not going  
22 to volunteer that, you know, to do that.

23 But this is not a zero-sum-gain. At  
24 least we don't view it that way from staff's  
25 perspective.

1 HEARING OFFICER SHEAN: All right.

2 MR. ABELSON: Now where I was going to  
3 go from there, and again it's up to you, Mr. Reede  
4 knows all the specific conditions. And so unless  
5 you all have other questions of me, I was just  
6 going to turn it over to him.

7 HEARING OFFICER SHEAN: All right, Mr.  
8 Reede, why don't you go ahead. And I don't know  
9 if we need to go through --

10 DR. REEDE: And it's Dr. Reede.

11 HEARING OFFICER SHEAN: I beg your  
12 pardon.

13 PRESIDING MEMBER KEESE: How long is  
14 this going to take?

15 DR. REEDE: It should go fairly quickly.  
16 I have three cleanup items in the text of the  
17 PMPD, and then --

18 PRESIDING MEMBER KEESE: Okay, let's do  
19 that before we take a short break. Go ahead.

20 DR. REEDE: Okay. I'd like to draw your  
21 attention to page 48 of the PMPD wherein it's  
22 stated much of that excess time was consumed by  
23 the applicant's attempt to provide aquatic biology  
24 studies to satisfy the informational needs for  
25 which staff claimed a new 316B study was required

1 ultimately to no avail.

2 I would like to correct for the record  
3 that staff issued a staff assessment four months  
4 after it was deemed data adequate. That this  
5 particular Committee did not issue a schedule  
6 until 11 months after the proceeding began.

7 We, on six occasions, staff, I should  
8 say, issued staff's reports --

9 PRESIDING MEMBER KEESE: We're going to  
10 change that.

11 HEARING OFFICER SHEAN: Yeah, --

12 DR. REEDE: Okay.

13 PRESIDING MEMBER KEESE: We're going to  
14 change it.

15 HEARING OFFICER SHEAN: We need to  
16 understand that the entire Commission has some  
17 responsibility here, and --

18 DR. REEDE: Okay.

19 HEARING OFFICER SHEAN: -- so --

20 DR. REEDE: Next item is going to page  
21 51 of the PMPD regarding staff's expert testimony  
22 contested the validity and reliability of the  
23 proxy data used by the Regional Water Board in  
24 granting the 2000 NPDES permit new. And that's  
25 the sentence. This is a collateral attack on

1 permit decisions of the Regional Water Board.

2 I would draw the Committee's attention  
3 to the Huntington Beach findings in that, and I  
4 quote: "Rather than relying on an extrapolation  
5 of 1970s data from other coastal plants, the  
6 applicant will conduct a one-year entrainment and  
7 impingement study at Huntington Beach to assess  
8 current project and potential cumulative impacts.  
9 They will also review best available technology  
10 for the intake system that might lessen  
11 entrainment and impingement.

12 We have worked very closely with the  
13 Regional Water Board. They told us they had no  
14 existing entrainment data that was site specific.  
15 Now the Committee or the Commission in the  
16 Huntington Beach rejected the use of that data.  
17 And staff in this proceeding rejected the use of  
18 that data. And I would ask that that particular  
19 paragraph be revised if at all possible.

20 PRESIDING MEMBER KEESE: We'll take a  
21 very close look at it.

22 DR. REEDE: Okay. Finally, in the next  
23 paragraph, it talks about cumulative impacts. And  
24 I would again refer to the cumulative impact  
25 section of Huntington Beach, which is 180 degrees

1 out from what has been written in this particular  
2 PMPD. And the last sentence, when the impacts  
3 from entrainment and impingement of queenfish at  
4 Huntington Beach are added to the impacts of  
5 entrainment and impingement at all southern  
6 California generating stations, the cumulative  
7 impacts on this and other marine species could be  
8 significant, but mitigable.

9 And now I'll go to our conditions of  
10 certification.

11 MR. ABELSON: -- take a break --

12 DR. REEDE: Oh, sure, we can take a  
13 break, sir.

14 MR. ABELSON: These are not related to  
15 bio. This is all the remaining stuff is non-  
16 biology related. So I don't know whether you want  
17 to take a break now or --

18 PRESIDING MEMBER KEESE: We'll take ten.  
19 Let's take ten. We'll start again at five minutes  
20 after on that clock.

21 HEARING OFFICER SHEAN: And, Mr. Luster,  
22 we'll probably go to you after Dr. Reede is  
23 finished.

24 MR. LUSTER: Okay, thank you very much.

25 (Brief recess.)

1           PRESIDING MEMBER KEESE:  -- 100, and  
2           somebody saying 200, then there's something to be  
3           reconciled here.  And you can either leave it to  
4           the wisdom of my Advisers and I, or you can help  
5           us out.

6           DR. REEDE:  We will.

7           MR. TOMASHEFSKY:  Speaking of wisdom,  
8           just a point of clarification, Mr. Reede.  What  
9           document are you actually referring to?  Because  
10          you are, I think, switching back between the PMPD  
11          and the Huntington Beach decisions.

12          DR. REEDE:  Okay, the Huntington Beach  
13          decision was page 44, second paragraph under  
14          cumulative impacts, that is tied to page -- I  
15          believe it was page 51, paragraph 2, cumulative  
16          impact section of the PMPD for El Segundo,  
17          paragraph 2, page 51.  And the related page in the  
18          Huntington Beach decision was page 44.

19          MR. TOMASHEFSKY:  Okay, thank you.

20          HEARING OFFICER SHEAN:  All right Dr.  
21          Reede, are you going to go ahead and list some of  
22          these conditions?

23          DR. REEDE:  Yes, and I'll be very brief  
24          because we have filed a document and said we will  
25          send electronic file to the Committee upon our



1 return.

2           There were approximately 20 conditions  
3 of certification that were omitted and we have  
4 submitted the omissions. And there was the  
5 incorrect revision used on a number of conditions  
6 of certification that have been revised or final  
7 language agreed to during the evidentiary  
8 hearings.

9           In a couple cases the revisions, the  
10 number revision used was a very early document, I  
11 believe, in the errata to the FSA. There were  
12 subsequently three other documents issued; and  
13 there were changes made during evidentiary  
14 hearings.

15           I have a complete listing that can be  
16 provided of which documents have revisions to the  
17 conditions of certification. All of those  
18 documents are on the Commission's website. Staff  
19 has been fairly prompt and exacting in making sure  
20 everything is put on the website.

21           HEARING OFFICER SHEAN: If you think  
22 that would help us that would be fine.

23           DR. REEDE: Okay.

24           HEARING OFFICER SHEAN: But are all your  
25 revisions --

1 DR. REEDE: I'm going to draw your --

2 HEARING OFFICER SHEAN: -- reflected in  
3 your appendix that was attached to your comments?

4 DR. REEDE: All the revisions that we  
5 found, okay. There were some that we did not find  
6 that had been missing. And in that particular  
7 case either the City of El Segundo or the  
8 applicant found those additional ones missing.

9 The one area that I really need you to  
10 focus on was the general conditions. Both the  
11 applicant and the staff had stipulated to a  
12 general condition regarding security, ComSec-8,  
13 that was stipulated to by the parties in, I  
14 believe, November of this past year, due to  
15 additional concerns --

16 HEARING OFFICER SHEAN: Understood.

17 DR. REEDE: -- relating -- okay.

18 HEARING OFFICER SHEAN: We've gone  
19 through some revisions of that. What I would like  
20 to do is to, since the last Commission-adopted  
21 general conditions is from the Salton Sea case,  
22 and we have reviewed those with some specificity,  
23 particularly as to --

24 DR. REEDE: That's what --

25 HEARING OFFICER SHEAN: -- Com-8 --

1 DR. REEDE: -- basically you have here.

2 HEARING OFFICER SHEAN: I'm just going  
3 to take the Word file, you can get it -- Word file  
4 I have for the Salton Sea, cross-reference and  
5 we'll get the latest and greatest to make sure  
6 I've got it.

7 DR. REEDE: I would also ask that the  
8 PMPD reflect the condition numbers, because that  
9 was how we discovered we didn't have general  
10 conditions.

11 HEARING OFFICER SHEAN: Okay, well, I  
12 mean understood.

13 DR. REEDE: Okay.

14 HEARING OFFICER SHEAN: And speaking of  
15 condition numbers, I guess I have some confusion  
16 with respect to air quality 30 condition. I think  
17 there was some discussion that the former air  
18 quality condition 1 went out, and that was to be  
19 replaced by another. I think our practice is  
20 generally if you delete one, we just call it  
21 deleted and then add it at the bottom.

22 DR. REEDE: My understanding was that  
23 the original 30 had been deleted. I can verify  
24 that at a later time.

25 HEARING OFFICER SHEAN: We'll track this

1 down. Okay, because in the City of El Segundo  
2 comments, their item number 1 does discuss AQ-29  
3 and AQ-30. We'll run this down and make sure  
4 we've got a complete set.

5 DR. REEDE: And I will docket it so that  
6 everybody has a copy of it.

7 HEARING OFFICER SHEAN: All right. Do  
8 you want to discuss any of your conditions, or  
9 should we just get to the point of asking whether  
10 any other party has comment with respect to any of  
11 those?

12 DR. REEDE: Basically our comments stand  
13 except for the applicant's comments on one  
14 particular, I believe it's Haz-4, Hazmat-4. Well,  
15 I'm reading from the applicant's comments and it's  
16 their page 5.

17 Relating to Haz-4, you have to excuse  
18 me, my ears never popped from the flight up here,  
19 so don't know how loud I'm speaking right now.  
20 The applicant is asking that some words be  
21 changed. Should the study conclude the  
22 substitution is infeasible and/or the project  
23 owner elects to continue discussions with staff.  
24 We cannot accept or. They make a decision.

25 And I think from a legal perspective

1 and/or has ramifications that are very much  
2 different. Now, I realize it's only a two-letter  
3 word, but it can mean whether or not the applicant  
4 will do what's agreed.

5 PRESIDING MEMBER KEESE: And/or has been  
6 debated many times. It doesn't exist, as far as  
7 I'm concerned, so --

8 DR. REEDE: Okay. Well, we would ask  
9 that it just be and.

10 PRESIDING MEMBER KEESE: I mean if it's  
11 and/or, it's both, so --

12 DR. REEDE: Correct. Additionally, with  
13 the City of El Segundo's item number 2, or page 2,  
14 item number 3, with the City of El Segundo is  
15 asking that all plant operators be trained in the  
16 hazardous material floor plan, are realizing that  
17 there's three shifts and that they'd only be, you  
18 know, offering it once. We're supportive of the  
19 City of El Segundo's request that Haz-2 be trained  
20 so that each shift -- that Haz-2 be changed to  
21 require the floor plan exercise be conducted so  
22 that all shifts attend.

23 And we have no other comments on the  
24 City of Manhattan Beach's PMPD comments.

25 MR. MCKINSEY: Can I ask a procedural

1 question?

2 DR. REEDE: Yes.

3 MR. McKINSEY: We didn't really -- I  
4 just want to emphasize we didn't bring up any  
5 reference to the other parties' proposed changes.  
6 That didn't imply that we were happy with them.  
7 You just asked each party to submit their proposed  
8 changes --

9 HEARING OFFICER SHEAN: We're going to  
10 come back around to you.

11 MR. McKINSEY: -- so as we were going  
12 through, I mean right now what we're doing is  
13 we're looking at other parties' proposed changes.  
14 And I thought the idea was to let those parties  
15 submit them. And our silence didn't imply that we  
16 didn't have comments on some of these things,  
17 because you'd asked --

18 HEARING OFFICER SHEAN: I understand.  
19 And before we're done we'll get to your comments  
20 on it.

21 MR. McKINSEY: Okay.

22 DR. REEDE: That's the extent of our  
23 comments on the PMPD -- I mean on PMPD conditions  
24 of certification.

25 HEARING OFFICER SHEAN: Okay. Now, --

1 DR. REEDE: Oh, I might note that we  
2 have included three proposed biological conditions  
3 in our comments. And those three biological  
4 conditions are staff's recommended conditions  
5 relating to potential licensing of this plant.

6 HEARING OFFICER SHEAN: As explained by  
7 Mr. Abelson.

8 DR. REEDE: By my --

9 HEARING OFFICER SHEAN: Esteemed  
10 colleague.

11 DR. REEDE: That's all, sir.

12 HEARING OFFICER SHEAN: All right, do we  
13 have any comments with respect to staff's offer of  
14 conditions?

15 MR. MCKINSEY: Yes. And I'll start with  
16 Haz-4. We do want to see the word or. If we were  
17 saying that and/or could be the choice, we would  
18 say or is the correct one, and not and. And what  
19 we have asked is that that was the agreed-to  
20 condition in the first place. We actually had a  
21 dialogue with staff's appropriate representative  
22 on this issue, and the idea was that we really  
23 could have a choice. Either if we find it's  
24 infeasible or we simply choose to, we can do this.

25 And what staff had indicated to us was

1       that there is no problem with doing it, and so or  
2       would be the final word. And so I don't know if  
3       that's the staff's position. I think what I'm  
4       hearing is they want to see both requirements be  
5       met before we be able to use the substance we want  
6       to use in Haz-4. But our position has been that  
7       we want the option of either choosing or showing  
8       it to be infeasible.

9               And so that's comment one, we would  
10       disagree with that.

11              MR. ABELSON: Officer Keese, if I -- beg  
12       your pardon, I'm tired -- Officer Shean, if I  
13       could just briefly join on that one issue. I'm  
14       not sure what the proper protocol is here, but on  
15       these conditions there were stipulations. There  
16       was acceptance into evidence based on those.  
17       There's obviously been a clerical error which  
18       you're going to correct.

19              But the stipulated condition is and.  
20       Not and/or; and definitely not or. If I'm wrong  
21       about that, I'd let Mr. McKinsey correct the  
22       record. But that is what I'm informed by my --

23              MR. MCKINSEY: The agreed-to condition  
24       on December 13th is and/or.

25              MR. ABELSON: Subject to -- can we just,



1 John and I, what I would offer to do on that issue  
2 is to simply confirm which of us is telling you  
3 correctly. And together we'll inform the  
4 Committee as to what the stipulated condition was.

5 HEARING OFFICER SHEAN: Okay.

6 MR. ABELSON: All I'm asking for is if  
7 that's what was stipulated, let's put that in.

8 HEARING OFFICER SHEAN: Well, then the  
9 most wonderful part about that is that the  
10 conditions are entirely within the discretion of  
11 the Commission.

12 MR. ABELSON: They are.

13 HEARING OFFICER SHEAN: And even if you  
14 can't come to terms as to what was stipulated to,  
15 the presentation to the Committee and ultimately  
16 the Commission will be the final determination.  
17 Okay, we understand.

18 MR. MCKINSEY: As to air, the staff has  
19 proposed changes to air quality-9, 17 and 25, all  
20 which would lower the CO limit from 6 to 2 ppm.  
21 The only agreed-to form of the condition had 6 ppm  
22 in it.

23 In the staff's direct testimony they  
24 indicated that 2 ppm was necessary, among other  
25 reasons, to bring it in compliance with the FDOC.

1 The FDOC, however, is 2 ppm -- I mean 6 ppm and  
2 has never changed. So the reason why we had said  
3 those conditions were correct is they matched the  
4 FDOC, which says that the CO limit should be 6  
5 ppm. So that's air quality-9, 17 and 25.

6 So we disagree with the staff's proposal  
7 to lower that to 2 ppm, because it doesn't match  
8 the FDOC.

9 On air quality 26 I'm not sure why the  
10 staff did this one. But they had suggested  
11 changing the standard for O2 measurement when  
12 determining compliance with the 5 ppm ammonia  
13 concentration, that the reference would be to 3  
14 percent oxygen, whereas the FDOC says 15 percent  
15 oxygen.

16 And it's really -- this is more  
17 problematic than the staff saying we want a  
18 different, a tightened standard, because they're  
19 not really lowering the limit, they're actually  
20 telling us determine your compliance with the  
21 limit with a different reference point.

22 And thus we'd be asked by the Air  
23 District to determine it at a 15 percent oxygen  
24 standard, and we would be asked by the Energy  
25 Commission to determine and stay within 5 ppm

1 ammonia using a 3 percent oxygen standard. And  
2 that won't work. And we can't change the Air  
3 District's position.

4 And so we would say that 15 percent  
5 oxygen is the correct standard on AQ-26, and we'd  
6 disagree with the staff.

7 The staff has proposed putting in a  
8 condition AQC-5 which was done at the last minute  
9 on January 22nd of 2003, that would add in the  
10 obligation to use specified certificates, ERCs,  
11 and that they be committed or surrendered to the  
12 project.

13 The problem we've always had with that  
14 condition, we were kind of reluctant as to this  
15 issue of the ERC numbers in particular are not  
16 really something we own. They're something that  
17 is issued and we're granted permission to use them  
18 by the Air District.

19 And so we are completely acceptable to  
20 the idea that the Commission has determined that  
21 AQC-5 is unnecessary. And so we would resist and  
22 we'd be opposed to having to have to reinsert that  
23 condition.

24 I will immediately say that this is  
25 different than what we said a year ago. So, I

1 know the comment -- I'm just, we were supportive  
2 of the idea of removing AQC-5, and we'd disagree  
3 with the staff on that.

4 I can also articulate that AQ-30 was,  
5 indeed deleted. And I think you may hear from the  
6 city of El Segundo if they have some explanation  
7 of why they want to insert it. And so the way the  
8 conditions are numbered and the content of the  
9 conditions is accurate and correct. In other  
10 words, the 2 through 29 includes all the air  
11 quality conditions that are corresponding to the  
12 operation of the facility that should be included.  
13 And we don't have a problem with that. And you  
14 will hear, obviously, from the City of El Segundo  
15 on what they meant by AQ-30 in their comments.

16 The other disagree me would have with  
17 the staff, and it's the only other one in their  
18 recommended changes, is regards if we did  
19 incorporate either Salton Sea's compliance  
20 section, or what the staff had recommended is the  
21 content of what was called Com-15, construction  
22 milestones.

23 That's actually a condition that we  
24 never did really reach agreement on, and I pored  
25 through the record and what I found was that we

1 had reached agreement to try to figure out exactly  
2 how we would word a couple of things because we've  
3 been continuously concerned with the idea that  
4 there really was no basis to obligate this project  
5 to commence construction. And more importantly,  
6 to penalize it if it doesn't meet certain  
7 guidelines.

8 The executive order that might have  
9 given that authority had expired. And the staff  
10 had argued that it could be used under another  
11 justification. But we never really agreed to  
12 that. And we are satisfied that that condition,  
13 Com-15, is no longer incorporated in the PMPD. So  
14 we're satisfied with the PMPD on that, and we  
15 disagree with the staff.

16 We did agree in November/December, as  
17 the staff indicated, on Com-8. That was an  
18 accurate thing.

19 And so all the other staff changes  
20 either concur with ours, or we don't have an  
21 objection to them. We will probably have a couple  
22 of comments depending on what we hear from the  
23 City of El Segundo and Manhattan Beach and any  
24 other parties on conditions. But as to the  
25 staff's those are our comments.

1 DR. REEDE: Commissioner Keese, as  
2 relates to Com-15, that's directly tied,  
3 construction milestones are directly tied to air  
4 quality C-5 in that there's a nexus between South  
5 Coast Air Quality Management District's granting  
6 them a priority credits and also community bank  
7 credits.

8 They have to pay for the priority  
9 credits from PM10s. The community bank credits  
10 are free PM10 credits that they're giving them  
11 because they're buying the priority credits.

12 Under the FDOC there's a requirement  
13 that they start construction within a year of  
14 certification, which is why the construction  
15 milestones are necessary, because they would then  
16 no longer have credits to mitigate the project.

17 So there's a nexus for the construction  
18 milestones.

19 MR. MCKINSEY: I would add one thing.  
20 We would disagree with that statement. There is  
21 absolutely no obligation that we start  
22 construction within a year because we're using  
23 priority reserve emission reduction credits.

24 PRESIDING MEMBER KEESE: They might --

25 MR. MCKINSEY: There is a requirement

1       that we have to come --

2               PRESIDING MEMBER KEESE:   You would lose  
3       the credits?

4               MR. McKINSEY:   No.

5               PRESIDING MEMBER KEESE:   I mean, if you  
6       didn't start with --

7               MR. McKINSEY:   No.

8               DR. REEDE:   Well, community bank credits  
9       they lose.

10              MR. McKINSEY:   The only obligation, and  
11       this is in our testimony on this, the testimony we  
12       indicated was, because we had a dialogue about a  
13       different requirement in the testimony, and that  
14       was whether or not what constraints there were  
15       that might justify Com-15.   And the constraint we  
16       have under the use of priority reserve credits is  
17       we have to complete construction within three  
18       years.

19              However, we indicated that's not really  
20       a hard limit.   We have the ability to get  
21       extensions to that.   And indeed, with the type of  
22       construction we have, involving a constricted  
23       access, a lot of restrictions on time of day and  
24       use of day, and a full demolition prior the  
25       construction, we couldn't make -- we're going to

1 be pushing to make the three years.

2 And so we kind of knew from the  
3 beginning we would probably have to get an  
4 extension on that constraint. And it's not a hard  
5 limit that says you lose them; it has within their  
6 own Air District rules the ability to extend that  
7 three-year window. And that's not for start of  
8 construction, that's for completion of  
9 construction.

10 So we would disagree with the staff's  
11 characterization on those rules.

12 PRESIDING MEMBER KEESE: Okay, and what  
13 is the rationale for requiring construction to  
14 start with --

15 DR. REEDE: The air quality credits,  
16 which are coming from a community bank of  
17 businesses that go belly up. They get put back in  
18 there and it's for businesses such as the  
19 applicant that don't have the ability to buy  
20 additional credits on the open market.

21 They only lock those credits in for one  
22 year unless you start construction. Once you  
23 start construction then those credits are locked  
24 in. The project would not be fully mitigated if  
25 they didn't start construction within one year



1 using credits from the Air District.

2 PRESIDING MEMBER KEESE: When they start  
3 construction they're going to have to have --

4 DR. REEDE: They're going to have to  
5 have those credits. But if they don't start it  
6 for a year and a half they put those community  
7 bank credits back into their bucket, so to speak,  
8 so other people can use them. They only commit  
9 those credits for one year if you start  
10 construction within that year. Demolition would  
11 be considered start of construction.

12 But we still have to adhere to those  
13 milestones because the project would not be fully  
14 mitigated if they did not start within one year  
15 because they would lose the PM10 credits.

16 MR. MCKINSEY: Can I say one more thing  
17 that's really important? We would disagree that  
18 the record at all at any point has one single  
19 statement that suggests that we only have a year  
20 to start construction or we'd lose the credits.  
21 There's nothing in the record that says that.  
22 And, indeed, is really, in fact, what I'm saying  
23 right now that there are no rules in the District  
24 that say that. That's new testimony, because this  
25 has never come up that there was some kind of

1 constraint that we use the credits within a year.

2 So right now the evidentiary record only  
3 addresses the other end of it which is, is there a  
4 constraint on when we have to complete  
5 construction by. There's nothing in the record,  
6 and I'm only saying this as a comment, I'd ask you  
7 to look at the record, that suggests we have a  
8 year or we lose the credits.

9 MR. ABELSON: Chairman, just one  
10 procedural point, if I may. I feel very uneasy  
11 about the dialogue we're having with regard to  
12 these aspects of the conditions for this reason.  
13 Things were stipulated to because they were agreed  
14 to and entered into the record without the benefit  
15 of briefing, without the benefit of argument,  
16 without the benefit of, you know, the myriad pros  
17 and cons that one would want to consider before  
18 making a decision.

19 There's been an administrative  
20 oversight; that's understandable. That's going to  
21 be corrected. But I would request respectfully  
22 that if we're going to get back into the merits of  
23 changing stipulated conditions, that we basically  
24 get an opportunity to brief the issues. Because  
25 we may indeed have a difference of opinion, and

1 perhaps it's irreconcilable, but you deserve to  
2 have the benefit of the arguments thoughtfully  
3 presented, you know, so you can consider which way  
4 you really want to go on it.

5 HEARING OFFICER SHEAN: Well, isn't it  
6 the thing we most deserve is the underlying basis  
7 that would suggest that this is the appropriate  
8 thing to do? Isn't it easier for you to give to  
9 us whatever you find either in the FDOC or the  
10 District regs or anywhere else that says, look,  
11 you guys are at risk if you do not commence  
12 construction. Your bank credits are going to  
13 lapse.

14 MR. ABELSON: All I'm saying, Officer  
15 Shean, --

16 HEARING OFFICER SHEAN: Okay, so I mean  
17 all I'm saying, and let me just finish my  
18 sentence, --

19 MR. ABELSON: Sure, sorry.

20 HEARING OFFICER SHEAN: -- if you want  
21 to provide to us -- first of all, with respect to  
22 the milestones as we used to use them, they were  
23 under the authority of the executive order. Since  
24 that executive order has now lapsed, for the most  
25 part you don't find these milestones in Commission

1 decisions now.

2 If there if another reason to have them  
3 there, and you can identify where in the record we  
4 would find that, then there is a reason to support  
5 it. So I would just say, since you're moving this  
6 forward, if you can provide us something that  
7 tells us where to look, or find it, yourselves,  
8 and provide it to us --

9 MR. ABELSON: All I'm asking for is an  
10 opportunity to do that in a thoughtful way,  
11 perhaps between now and the 30th we may actually  
12 have-- what's today, today's the 23rd -- but I'm  
13 sure we had a reason why we were, you know,  
14 advocating that position. We'd like a chance to  
15 represent it.

16 HEARING OFFICER SHEAN: That would be  
17 fine. You have till March 1, right?

18 MR. MCKINSEY: I would iterate I  
19 actually agree with Mr. Abelson's position that  
20 we're not talking, in fact here we would say we're  
21 not talking about modifying an agreed-to  
22 condition. This has come up two reasons. One, we  
23 never reached agreement on Com-15; and two, it's  
24 already not in the PMPD. And so all we're really  
25 iterating is we agree to that decision to remove

1       it. And that's actually what's brought it up, is  
2       that you've chosen not to include a Com-15.

3               And I wasn't trying to suggest that we  
4       want to go into; however I did just concede that  
5       you made a change to another condition that we're  
6       okay with, even though it was agreed to. And  
7       that, once again, was because you had made a  
8       change that we're comfortable with.

9               HEARING OFFICER SHEAN: Okay.

10              MR. McKINSEY: So we've completed our  
11       comments.

12              HEARING OFFICER SHEAN: Your comments.  
13       Does any other party have a comment on the staff's  
14       proposed changes?

15              Okay, why don't we move now to Mr.  
16       Luster from the Coastal Commission and have you go  
17       ahead, sir.

18              MR. LUSTER: Okay, thank you very much.  
19       I've just got a couple of brief comments right  
20       now, primarily about the written comments we sent  
21       last week. And I'll then be available to try to  
22       answer any questions you have.

23              To open, first off, the Coastal  
24       Commission has not objected to the continued  
25       operation of this plant, but has recognized the

1 project as proposed in the AFC does not yet  
2 conform to the Coastal Act.

3 We have a number of concerns with the  
4 PMPD. We'll be providing additional written  
5 comments by the deadline next week. Today I'll  
6 very briefly cover the comments provided last week  
7 in regards to two main areas.

8 First, the baseline used in the PMPD for  
9 marine biology. We believe that's insufficient  
10 under both CEQA and the Coastal Act. Essentially  
11 without the necessary biological information  
12 that's currently missing any number that you pick  
13 for appropriate flow level is arbitrary and would  
14 be useless for purposes of determining impacts to  
15 marine biology.

16 Secondly, we believe the PMPD improperly  
17 handles the Coastal Commission's review  
18 responsibilities under both the Warren Alquist Act  
19 and the Coastal Act. And at this point in the  
20 process it appears, based on the applicable  
21 requirements, that they allow either of two  
22 options to the Committee.

23 One is to reject the proposed  
24 amendments, the applicant's proposed amendments  
25 that were adopted as part of the PMPD, and instead

1       require the necessary entrainment study, or reject  
2       it for purposes of infeasibility or that it would  
3       cause greater adverse environmental impact. And  
4       we have comments on that option in our written  
5       material.

6               The other option would be to retain the  
7       proposed amendments but request that the Coastal  
8       Commission review them for conformity to the  
9       Coastal Act policies.

10              I know that a lot of questions have come  
11       up previously today, that you probably have a few  
12       for me. I'll let the rest of our written comments  
13       from last week speak for themselves, and go right  
14       to your questions if you have them.

15              HEARING OFFICER SHEAN: Thank you, Mr.  
16       Luster. This is Garret Shean. Yes, I do.

17              And you've reiterated what I read on  
18       page 2 of your submittal which is in the portion  
19       called, I guess I won't call it paragraph one, but  
20       heading number one. And let me just read it  
21       because I think it is something you just  
22       restated.

23              It says: The underlying error behind  
24       each of these is that the PMPD does not use their  
25       current and relevant entrainment data to describe

1 the existing conditions.

2 Now, if I've understood what you put in  
3 writing and what you've just said, in the Coastal  
4 Commission's view the 316B, let me just call it  
5 the 316-B type study, is necessary because it  
6 provides the basis to define the existing  
7 conditions under CEQA, is that correct?

8 MR. LUSTER: It's correct. And not only  
9 the existing conditions under CEQA, but for  
10 purposes of the Coastal Act. And we recognize the  
11 appropriate flow level is one part of determining  
12 existing conditions, but that's only one piece of  
13 the puzzle.

14 The effect that that flow level has on  
15 marine biology should be a part of the baseline  
16 description, but there are no entrainment data  
17 available to provide that information.

18 It's almost as if, I was trying to think  
19 of a good analogy. It's like saying that say  
20 you're a traffic engineer; you're designing, you  
21 say a two-lane road is wide enough, but you're  
22 basing that on what traffic was like 20 years ago  
23 in a town 50 miles away. You don't have any  
24 current information on traffic flows in that area.

25 To go ahead now without any entrainment



1 data is to miss potential impacts. For instance,  
2 if there are seasonal caps in the spring of the  
3 year, but the flows are maximized later in the  
4 year when a certain species may be spawning, we  
5 have no idea, based on the current information in  
6 the record, what sort of impact that would have.

7 And the only way to get that information  
8 is through an entrainment study.

9 HEARING OFFICER SHEAN: Okay, let me  
10 just do a couple things here. So, am I correct  
11 that as the staff was stating its position, and,  
12 of course, the staff has a couple of different  
13 views as to which flow level they think is  
14 appropriate, but am I correct in understanding  
15 that the Coastal Commission would add to the flow  
16 level also data derived from a 316B type study as  
17 necessary for defining the existing conditions  
18 under CEQA? And then we'll get to your Coastal  
19 Commission act as a separate item.

20 MR. LUSTER: Well, I'm trying to recall.  
21 I don't believe the Coastal Commission weighed in  
22 on the CEQA baseline question you just asked in  
23 their -- or 413D report. They did say that under  
24 the Coastal Act that entrainment study would be  
25 necessary for conformity to the Act.

1 I guess I could, by extension, say that  
2 would apply to CEQA since, like the Energy  
3 Commission's process, the Coastal Act -- or the  
4 Coastal Commission's determinations are considered  
5 CEQA equivalent.

6 HEARING OFFICER SHEAN: Okay, well, I'm  
7 not trying to get you to say or do more than what  
8 you think you had intended, at least in the  
9 immediate past.

10 And so as far as the 316B study, that,  
11 in your mind, is independently necessary for  
12 Coastal Act conformity?

13 MR. LUSTER: Correct, yes. Now, a ways  
14 back in this review we, along with Energy  
15 Commission Staff, did accept a proposal from the  
16 applicant saying, you know, could we try this King  
17 Harbor data to see if it would be adequate. And  
18 we're open to that possibility. But as it turned  
19 out, those data weren't adequate.

20 And, you know, based on that the Coastal  
21 Commission then went on and determined that a new  
22 entrainment study would be needed.

23 HEARING OFFICER SHEAN: Okay. The  
24 Chairman had previously asked questions about  
25 considering all the things that are before this

1 Commission, and we're looking at not only the flow  
2 caps and ascertaining what might be appropriate,  
3 and also the contemplated NPDES process that would  
4 apply the apparently more stringent 316B  
5 requirements.

6 Now, can you tell us how you would see  
7 the Coastal Commission interacting with the  
8 results of the 316B study and a new NPDES permit?  
9 Do you consider that you have a legal  
10 responsibility to go beyond whatever the  
11 provisions of the permit are in order for you,  
12 under the Coastal Act, to satisfy your conditions  
13 with regard to, most particularly, enhance,  
14 restore and minimize the entrainment?

15 MR. LUSTER: Well, let's see. I think I  
16 heard two questions. One is how the Coastal  
17 Commission would interact with this future study  
18 by the Regional Board based on the new 316B rule.  
19 I imagine that we would interact with them,  
20 probably, you know, through workshops or working  
21 groups or something; work to develop if there's a  
22 need for updated protocols or that sort of thing.

23 But the concern for the immediate  
24 project is that, as was stated earlier, depending  
25 on a future study to determine impacts for a

1 decision currently before us, doesn't provide  
2 necessary information when we need it, which is  
3 right now.

4 I think one of the briefs you received  
5 last week from one of the parties mentioned the  
6 Sundstrom case, which is always quoted to me as  
7 establishing that principle that you need to know  
8 the impacts of the proposed project when you're  
9 making the decision, rather than put that off to  
10 some future studies and determinations based on  
11 that study.

12 HEARING OFFICER SHEAN: May I ask you  
13 that, then. To what extent can the Energy  
14 Commission rely on an apparently existing and  
15 valid permit with respect to knowing what the  
16 impacts are now, or are, as permitted?

17 MR. LUSTER: Well, there was some talk  
18 earlier about whether the Regional Board had  
19 exclusive jurisdiction over coastal waters or not.  
20 And clearly they don't, or the Regional Board's  
21 laws and regulations would be the only ones that  
22 were applicable there. The Coastal Act, the  
23 Energy Commission in reviewing this proposal,  
24 State Fish and Game, all sorts of other statutes  
25 apply to coastal waters.

1           And we do have a section of the Coastal  
2   Act that defines part of the relationship between  
3   us and the regional boards. We can't conflict  
4   with a determination by a regional board, but that  
5   doesn't mean we can't go beyond them. And, in  
6   fact, we do go beyond them in a number of ways.  
7   In part because we're looking at different aspects  
8   of a project, or focusing on different types of  
9   impacts.

10           The regional board has a different  
11   standard than we do in our requirements to  
12   maintain, restore and, where feasible, enhance  
13   marine biological resources. That standard  
14   sometimes results in Coastal Commission decisions  
15   going beyond what a regional board would decide.  
16   In part because the regional board doesn't look at  
17   that particular standard in its decision-making.

18           There's also some talk earlier about the  
19   whole question of federal preemption. And the  
20   comments, I'll get to you additional written  
21   comments by next week. We've written a position  
22   paper on federal preemption that shows very  
23   clearly that the Regional Board's NPDES permit is  
24   a state, not a federal permit.

25           And the question of whether a federal

1 permit preempts actions of the Coastal Commission  
2 shouldn't even apply in this situation.

3 Does that make sense?

4 HEARING OFFICER SHEAN: Yes, it sounds  
5 like a Pandora's Box.

6 (Laughter.)

7 PRESIDING MEMBER KEESE: This is Bill  
8 Keese. But if it's a state action does it fall  
9 under the jurisdiction of the Energy Commission to  
10 override it?

11 MR. LUSTER: Well, our read of the  
12 Warren Alquist Act allows the Energy Commission to  
13 override specific provisions provided by the  
14 Coastal Commission under just those two  
15 circumstances in 25523(b), due to infeasibility or  
16 due to greater adverse environmental harm.

17 And outside those limited exemptions I  
18 guess the burden is on the Energy Commission to  
19 adopt the Coastal Commission's specific  
20 provisions.

21 PRESIDING MEMBER KEESE: Okay. The  
22 question of baseline for impact. What do you  
23 consider the baseline?

24 MR. LUSTER: As far as the flow numbers?

25 PRESIDING MEMBER KEESE: Well, is it --

1 are we starting with -- if we use what staff has  
2 indicated as historically what the Energy  
3 Commission has used in these cases, which is the  
4 average of the five years before the filing, does  
5 that -- that establishes a base flow, and I guess  
6 that establishes a -- if we do a study that  
7 establishes the base as to entrainment and  
8 impingement. Is that the base from which we start  
9 and we say mitigate anything above that?

10 MR. LUSTER: Well, I think I'll defer on  
11 that one. In part because the Coastal Commission  
12 did not weigh in on selecting what it thought an  
13 appropriate flow regime should be. And also, in  
14 part, they think a finding by the Coastal  
15 Commission to require the entrainment study just,  
16 it makes it -- the question as to flow is  
17 premature without knowing what sort of organisms  
18 are out there being affected, and to what degree.

19 The flow numbers are secondary to that  
20 as far as establishing baseline.

21 PRESIDING MEMBER KEESE: Well, the flow  
22 numbers will be what translates --

23 MR. LUSTER: I missed that, I'm sorry?

24 PRESIDING MEMBER KEESE: The flow  
25 numbers will translate into your entrainment and

1       impingement.

2               MR. LUSTER:  Right, but only as soon as  
3       we know what sorts of organisms are involved.  So  
4       without that missing piece of the puzzle, whether  
5       it's 101 million or 139 million or something in  
6       between is kind of an arbitrary selection at this  
7       point, because we don't know how any given flow  
8       will affect the marine community at, you know,  
9       given times of the year.

10              PRESIDING MEMBER KEESE:  I believe we  
11       were saying that for our CEQA analysis of whether  
12       there is an impact we would look to see if there  
13       is a higher flow than historical.  And we're  
14       differing on what the number, base historical  
15       number should be.

16              MR. LUSTER:  Well, I guess it's the flow  
17       during whatever flow regime is picked.  If the  
18       flow at any given time of the year -- excuse me,  
19       if the proposed flow at any given time of the year  
20       is greater than the flow during the baseline  
21       period, that could be an unacceptable or  
22       significant impact on the marine community.

23              PRESIDING MEMBER KEESE:  Correct, and --

24              MR. LUSTER:  Based on, you know,  
25       spawning patterns or presence or absence of



1 various marine organisms at that particular time  
2 of year that we're not aware of yet without that  
3 entrainment data.

4 PRESIDING MEMBER KEESE: I think we're  
5 in agreement on that. Now, in the second  
6 question, so the baseline is established, and if  
7 you're not having an impact above that, under CEQA  
8 you don't have to mitigate it.

9 Now we come to the Coastal Commission  
10 rules and to include enhance. Are you, for your  
11 purposes, the Coastal Commission purposes, are you  
12 suggesting that the baseline is zero; that we  
13 should mitigate any impact that this plant has?

14 MR. LUSTER: Well, I guess what we're  
15 saying is we don't know what the baseline is  
16 absent that entrainment data.

17 PRESIDING MEMBER KEESE: But after we do  
18 the entrainment data and decide what historically  
19 was taken, then what we would mitigate is what  
20 additional taken above that?

21 MR. LUSTER: I missed the last, could  
22 you repeat the question, please?

23 PRESIDING MEMBER KEESE: Once we  
24 determine from this study what was being taken, is  
25 the mitigation then what additional amounts are

1       being taken above that? Or do you assume that we  
2       should try to get to zero and everything being  
3       taken should be mitigated?

4               MR. LUSTER: Well, I don't think it's as  
5       simple as that unfortunately. Mr. Abelson talked  
6       earlier about the idea of mitigating to the extent  
7       feasible and assigning a dollar value to, you  
8       know, what feasible amount could be paid to  
9       mitigate.

10              Restoration to the point feasible could  
11      be -- I think that could fit within that  
12      presentation by Mr. Abelson. If the Committee  
13      determines, you know, based on the record, the  
14      entrainment data showed this much of an impact due  
15      to baseline conditions, and the applicant -- it's  
16      feasible for the applicant to restore up to x  
17      amount, -- I'm trying to say, that's less based on  
18      whatever flow number is picked and more on the  
19      feasible mitigation measures that are necessary.

20              Does that make sense?

21              HEARING OFFICER SHEAN: But is the  
22      necessary, as you use that word --

23              MR. LUSTER: Necessary to conform to the  
24      Coastal Act, yes. The requirement to restore  
25      where feasible.

1 HEARING OFFICER SHEAN: Okay, let me --

2 PRESIDING MEMBER KEESE: All right. I  
3 think we're hearing what the positions are. It's  
4 certainly difficult for us. In any event it would  
5 be difficult to establish at the front end what  
6 the dollar amount, dollar mitigation amount is.

7 MR. LUSTER: Which is part of what we're  
8 concerned about moving ahead at this point without  
9 the entrainment data. Had it been required much  
10 earlier in the review process after the staff  
11 recommendation that the Kings Harbor data were not  
12 adequate, then this question would be a much  
13 easier one to handle at this point.

14 And as long as it remains unanswered,  
15 the number that you establish for purposes of  
16 feasibility is probably arbitrary.

17 PRESIDING MEMBER KEESE: I guess my  
18 final question would be if, under the new federal  
19 rules that will be applicable to this when a  
20 permit is granted, there is a significant  
21 reduction in entrainment or impingement, should  
22 the decision be written to give benefit to the  
23 applicant for that purpose?

24 So, for instance, if there was a 50  
25 percent reduction in both, which is not realistic

1 I don't believe, if we have some of one and very  
2 little of another, but if it was 50 percent,  
3 should we write it that we take off our limits as  
4 to how much flow there should be? Do we need flow  
5 limits anymore if we reduce the entrainment and  
6 impingement by 50 percent?

7 MR. LUSTER: Well, I guess a couple  
8 responses. I'd have to wait and see what the  
9 actual situation is, you know, if and when the new  
10 rule was finalized and survives all appeals and is  
11 implemented.

12 The one part that we haven't talked  
13 about yet really, the Coastal Act not only  
14 maintain, enhance or feasibly restore the marine  
15 biology, there's a requirement to minimize adverse  
16 effects of entrainment. So a strict reading of  
17 that would be minimize, meaning to bring to the  
18 lowest level possible. Whether that's a 50  
19 percent reduction, a 60 to 90 percent that's  
20 talked about in the new rule, or something less  
21 than that. We have to depend on, you know, what  
22 sorts of effects are being caused and what kind of  
23 changes are feasible to address them.

24 PRESIDING MEMBER KEESE: And we have to  
25 balance how much energy can be produced, because

1 obviously if we -- we can serve all of those  
2 purposes if we just shut down the plant. But --  
3 so our balancing has to be somewhere in between  
4 here.

5 MR. LUSTER: Oh, and we're not  
6 suggesting that -- and we're fine with the plant  
7 operating under its existing conditions. We're  
8 fine if the proposal meets the Coastal Act  
9 requirements. And it's not to say that a coastal  
10 power plant can't meet the Coastal Act  
11 requirements, you know. A number of them are up  
12 and down the street that have gone through Coastal  
13 Act review. Ten have gone through Energy  
14 Commission decision-making based on the Coastal  
15 Commission's input.

16 HEARING OFFICER SHEAN: Let me just ask  
17 again. I heard and wrote down the words, we're  
18 fine with the plant operating under the existing  
19 conditions. Is that what you said?

20 MR. LUSTER: Yes. If this was not  
21 subject to an AFC review that required the  
22 determination of the Coastal Commission as to  
23 whether the proposal would conform to the Coastal  
24 Act, then if it were fine, I should translate to  
25 mean we have no say in it, you know. It would

1 operate as an existing facility; there's no  
2 development that kicks into review under the  
3 Coastal Act.

4 But because it's in this process, and is  
5 proposing a change to the facility, we're  
6 involved.

7 HEARING OFFICER SHEAN: So it's only  
8 because on the landward side of the ocean cooling  
9 water system is going to change; that's what makes  
10 it un-fine for the Coastal Commission?

11 MR. LUSTER: Well, the water work side  
12 changes as well, as far as the Coastal Act is  
13 involved. Our definition of development that  
14 kicks into our review or permit process includes  
15 removal or discharge of anything from the ocean,  
16 which in this case includes the cooling water;  
17 plus the, you know, the Warren Alquist Act  
18 requires the Coastal Commission involvement in  
19 this situation just because the facility is  
20 located in the coastal zone.

21 HEARING OFFICER SHEAN: Okay, I just  
22 have a few questions. Did you hear the staff  
23 proposal with respect to its three offered  
24 biology --

25 MR. LUSTER: That was talked about

1 earlier today?

2 HEARING OFFICER SHEAN: Yes.

3 MR. LUSTER: Or was that in the written?

4 HEARING OFFICER SHEAN: It was in their  
5 written submittal and was talked about earlier  
6 today as the staff's suggested conditions with  
7 respect to biology. And they basically were that  
8 there be annual and monthly flow caps; there be a  
9 post-certification 316B type study and everything  
10 that follows from that; plus a deposit of all  
11 feasible mitigation funds in trust.

12 MR. LUSTER: Right. Well, yes, I did  
13 get that.

14 HEARING OFFICER SHEAN: What's the  
15 Coastal Commission Staff reaction --

16 MR. LUSTER: The Coastal Commission's  
17 report found, or had the specific provision that  
18 an entrainment study would be needed before the  
19 final decision by the Energy Commission. And so  
20 that's the Coastal Commission's position.

21 Well, to determine conformity with the  
22 Coastal Act on either the applicant's proposed  
23 amendments, including the aquatic filter barrier  
24 and the payment in the restoration fund, that sort  
25 of thing, or the staff's proposals here, that

1 would require requesting of the Coastal Commission  
2 a review and their position on whether either or  
3 both of these amended versions of the project  
4 would conform to the Coastal Act.

5 And then perhaps a revised PMPD issued  
6 with the Coastal Commission's additional input on  
7 this amended, one or the other version of the  
8 amended project.

9 HEARING OFFICER SHEAN: I have one last  
10 question, Mr. Luster. The 30413 Coastal  
11 Commission report that you just referred to, in  
12 the Public Resources Code there are enumerated  
13 items under the sentence that reads: The  
14 Commission's report shall contain a consideration  
15 of and findings regarding all of the following.  
16 And item number 5, and it's the only one that uses  
17 the word conformance, "the conformance of the  
18 proposed site and related facilities with  
19 certified local coastal programs in those  
20 jurisdictions which would be affected by any such  
21 development."

22 Now, I know that you testified last year  
23 and the staff's brief discussed in the spring the  
24 relevance of the local coastal plan or program for  
25 El Segundo.



1           Now, can you tell me, first of all, has  
2           the Committee mischaracterized that 1982 certified  
3           El Segundo LCP and the language that seems to  
4           suggest that the federal NPDES permit process  
5           adequately addresses the Coastal Act policies  
6           related to the protection of water and marine  
7           resources? Is that incorrect in terms of the  
8           pages of the LCP we're looking at?

9           MR. LUSTER: Well, actually that's part  
10          of my written comments I'm preparing before the  
11          March 1st deadline.

12          HEARING OFFICER SHEAN: Well, then  
13          that's fine. You don't need to try to answer it  
14          now. But I think that's one of the things that  
15          the Committee is interested in. First of all,  
16          whether or not that 1982 version of what we see to  
17          be the Coastal Commission certified LCP, and what  
18          is the meaning, if any, of the language that says  
19          that the federal NPDES permit process adequately  
20          addresses Coastal Act policies related to  
21          protection of water and marine resources. And  
22          then what we should do with that.

23          MR. LUSTER: Right. Well, I'll give you  
24          a brief preview, I guess. I'm looking quickly for  
25          the full citation. I don't see it right offhand.

1 But basically the LCP states that the water and  
2 marine resources policies of the Coastal Act are,  
3 quote, "not applicable or have been adequately  
4 addressed by other state or federal laws."

5 And I would presume that the not  
6 applicable choice would be the appropriate one for  
7 here because the things that occur in the offshore  
8 waters are outside El Segundo's LCP jurisdiction.  
9 And so a question as to whether an NPDES permit is  
10 adequate is not applicable in this case.

11 HEARING OFFICER SHEAN: So if I  
12 understand correctly, the LCP, which acknowledges  
13 the existence, for example, of both the Edison El  
14 Segundo project and the Chevron terminal --

15 MR. LUSTER: Um-hum.

16 HEARING OFFICER SHEAN: -- does not --  
17 are you saying that it does not apply because  
18 physically or geographically the intake and  
19 outfall are too far offshore, or something like  
20 that?

21 MR. LUSTER: Well, for instance, an  
22 NPDES permit for those facilities or for other  
23 ones in El Segundo, those permit conditions can  
24 cover things like industrial stormwater runoff,  
25 you know, treatment requirements for municipal

1 service yards or whatever.

2 And so I think -- I can't go back in  
3 time and know what exactly everybody was thinking  
4 in 1982, but I think the reference to NPDES  
5 permits, it doesn't exclude -- excuse me, our  
6 current reading of that doesn't exclude  
7 recognition of NPDES permits because many of their  
8 conditions apply within El Segundo proper.  
9 Portions of them also apply outside of El  
10 Segundo's jurisdiction.

11 And in that case it would be the Coastal  
12 Commission using its direct authority under its  
13 retained jurisdiction rather than depending on the  
14 LCP to, you know, say that those impacts are  
15 covered.

16 HEARING OFFICER SHEAN: Okay, so if I'm  
17 understanding correctly the current position of  
18 the Coastal Commission is that the LCP applied to  
19 a certain extent, but the Coastal Commission has  
20 retained that portion of the jurisdiction that  
21 relates to --

22 MR. LUSTER: Yes, in most cases, and I  
23 believe it's the case in El Segundo, the Coastal  
24 Commission retains its jurisdiction up to the  
25 ordinary high water mark of coastal waters. So

1 everything offshore essentially is Coastal  
2 Commission jurisdiction. And inshore that line  
3 would be under El Segundo's jurisdiction.

4 HEARING OFFICER SHEAN: So there  
5 essentially is a physical demarcation?

6 MR. LUSTER: Yes. And there's also a  
7 reserved clause in the Coastal Act that reserves  
8 consideration of major energy facilities to the  
9 Coastal Commission, as well.

10 HEARING OFFICER SHEAN: All right.  
11 Thank you.

12 MR. LUSTER: Um-hum.

13 HEARING OFFICER SHEAN: Okay, I think,  
14 Mr. Luster, that's pretty much it. Did you want  
15 to comment on any of the condition rewrites that  
16 you may have heard while you were monitoring the  
17 conversation previously.

18 MR. LUSTER: Yeah, I don't think I've  
19 heard any else to comment; I'll be looking at  
20 other biology in my further comments.

21 HEARING OFFICER SHEAN: All right, thank  
22 you.

23 MR. LUSTER: Okay, thanks.

24 HEARING OFFICER SHEAN: I think at this  
25 point we should go to the environmental

1        intervenors, and that would be Heal The Bay and  
2        Baykeepers.

3                And then we'll do the City -- the  
4        Cities, and then we should be pretty much done.  
5        Murphy-Perkins have agreed to come back for the  
6        comment period that begins at 6:00 or thereabouts.

7                Yes, sir.

8                DR. GOLD:    Good afternoon.    My name's  
9        Dr. Mark Gold and I'll start our comments, and Dr.  
10       Craig Shuman will complete them.    Unfortunately,  
11       our attorney for the case, Tracy Egosegoe, was  
12       unable to make it today and asked me to send her  
13       regrets.

14               Just for background, just a reminder on  
15       Santa Monica Bay, it's part of the National  
16       Estuary Program.    One of the goals of the National  
17       Estuary Program in particular is to protect and  
18       restore the Bay's natural resources.    And this is  
19       also a goal of Heal The Bay and the Santa Monica  
20       Baykeepers, so this is a mission for us, as well.

21               Although we strongly urge the CEC to  
22       reject the requirements of the proposed decision,  
23       and we support CEC Staff's recommendation to  
24       adequately study and potentially adopt the  
25       wastewater cooling option, or adopt a fully

1 mitigated option, we also support the Coastal  
2 Commission's offer to determine if the project  
3 conforms with the Coastal Act. Clearly we just  
4 heard for the last hour about those particular  
5 issues.

6 We believe that the 316B type study is  
7 necessary to adequately assess impacts to marine  
8 resources, and subsequent determination of  
9 mitigation requirements must be completed before  
10 project approval takes place. So that's the  
11 position of our organization.

12 We're not trying to stop this project.  
13 We are trying to make this project protective of  
14 the already degraded resources in Santa Monica  
15 Bay.

16 HEARING OFFICER SHEAN: Since you are so  
17 emphatic, Dr. Gold, do I understand then if it  
18 must be done before, then the elements of the  
19 staff's new suggested or recommended conditions  
20 would not satisfy that because they would occur  
21 afterward? Is that -- am I hearing --

22 DR. GOLD: Right. And we'll get more  
23 into the logic behind that. But predominately  
24 it's that you can't really determine what adequate  
25 mitigation is until that study is completed. The

1 last thing we want is a San Onofre type situation  
2 that labors on for a decade before determination  
3 is made on adequate mitigation.

4 Your own staff has been critical, Fish  
5 and Game, NMFS, the Coastal Commission, as well,  
6 has been critical about the draft proposal, as it  
7 is. What we'd like to say, which I'll go through  
8 very very quickly because much of it is redundant  
9 to what has been said.

10 It's that the approval of the proposed  
11 project violates CEQA. The project calls for the  
12 demolition and replacement of existing El Segundo  
13 Generating Facility. It does not leave it intact.  
14 Therefore, it's required by CEQA, must mitigate or  
15 avoid significant adverse environmental impacts  
16 where possible, and to provide fully enforceable  
17 mitigation measures.

18 Also, on the proposed decision, legally  
19 determines the baseline by using the NPDES permit.  
20 That's been discussed at length. We're in  
21 concurrence with the fact that the baseline should  
22 be zero at intake one, which means the baseline  
23 should be 102 billion gallons per year.

24 Also we're very troubled by discussion  
25 to basically say that an NPDES permit decision is

1 basically the functional equivalent of CEQA.  
2 Although that's true for the Regional Water  
3 Quality Control Board, I've never heard before,  
4 and I've appeared before the Regional Board well  
5 over 100 times in the last 15 years, I've never  
6 heard anyone trying to apply a permit decision and  
7 the findings in a permit decision to other CEQA  
8 oriented decisions. So this is very surprising to  
9 me and our organizations, as well.

10 Why the 102 billion gallons per year? I  
11 think you've heard earlier that the five-year  
12 averaging period was, in essence, manipulated into  
13 indicate higher flow during the peak of the energy  
14 crisis. And also basically Units 1 and 2 were  
15 completely shut down over the last couple of  
16 years. So that's why the 102 billion gallons per  
17 year makes more sense.

18 The Regional Board, in the past, has not  
19 supported directly the applicant's position that  
20 the current permit is determinative of the  
21 previous environmental review. I can tell you,  
22 having gone through and appeared on that permit in  
23 front of the Regional Board, there really was  
24 hardly any discussion whatsoever on flow. So this  
25 was not really the major issue at that time. It



1 was really more from the standpoint of monitoring  
2 impacts to the receiving waters at that time.

3 From the standpoint of El Segundo  
4 Generating Station, it has significant unmitigated  
5 effect on the environment. And these impacts have  
6 not been adequately addressed, as has been stated  
7 in what we submitted previously. The alternative  
8 cooling options have not been fully explored, and  
9 obviously that's something that needed to be done.

10 Also the proxy studies were not  
11 appropriate. You've heard that ad nauseam from  
12 the standpoint of the Ormond Beach studies being  
13 25 years old or so. The Scattergood proxy study  
14 basically used outdated methods. And King Harbor,  
15 which is also in close proximity to another power  
16 plant, the Redondo Power Plant, was not designed  
17 to assess the entrainment impacts, as well.

18 So there really has not been reference-  
19 based studies to determine what those conditions  
20 should be and what the impacts of the operation of  
21 the facility and the expansion of the facility  
22 will be. And so that's why that is sorely needed,  
23 is to do that reference-based sorts of work.

24 On the other issue, from the standpoint  
25 of waiting for the NPDES permit to make further

1 determinations, that's a great concern, as well.

2 We can't presuppose what the Regional Water  
3 Quality Control Board is going to decide in 2005,  
4 or maybe even 2006, since there's an extensive  
5 permit backlog at the Regional Water Quality  
6 Control Board, to actually determine what sorts of  
7 studies are going to be done.

8 That's why we urge you to make the  
9 decision today, or in this process, on really  
10 making sure that the 316B type work occurs as soon  
11 as humanly possible.

12 On the issues that were brought up so  
13 clearly by -- oh, I'm sorry, one other thing is  
14 deferred mitigation measures are not legal or  
15 appropriate. So that's in relation to the 2005  
16 NPDES permit. And that mitigation again should be  
17 determined based on study results, not some  
18 arbitrary determination right now, which I guess  
19 some people have been asked to sort of guess what  
20 the mitigation amount would be. And we believe  
21 that there's not enough information to really make  
22 that determination at this point.

23 PRESIDING MEMBER KEESE: I think that's  
24 certainly fair. The question is should we take  
25 anything that happens under that process into

1 consideration in crafting our decision. Not that  
2 it would be adequate mitigation, but for instance,  
3 as I asked the question before, if the applicant  
4 is required to reduce entrainment and impingement  
5 by 50 percent, under that rule, should we write in  
6 our decision that at that point our monthly flow  
7 requirements are removed so that they can produce  
8 full power.

9 DR. GOLD: I mean from the --

10 PRESIDING MEMBER KEESE: Assuming that's  
11 the decision. I mean we have a major disagreement  
12 here on whether they can produce at full power.

13 DR. GOLD: I think from the standpoint,  
14 and I think this was echoed by the staff member  
15 from the Coastal Commission, is that without  
16 adequately knowing really the specificity of  
17 what's being entrained, and also what the  
18 conditions would be in non-impacted areas, I still  
19 think arbitrarily choosing a 50 or 60 percent flat  
20 level as something for mitigation, could be  
21 completely missing the boat from the standpoint of  
22 protecting the resource. And so that's obviously  
23 our primary consideration.

24 Again, we strongly support the Coastal  
25 Commission's positions on both the El Segundo LCP

1 not being the functional equivalent of compliance  
2 with the overall Coastal Act. The outdated LCP is  
3 not reflective of the current situation in the  
4 Bay. We're talking about 22-year-old LCP.

5 Again, like even worse than the Regional  
6 Board's backlog would be the Coastal Commission's  
7 backlog on LCP. So that's very very critical  
8 there.

9 And then finally, approval of the  
10 proposed project violating the Coastal Act. As  
11 you've heard many many times in the last two  
12 hours, under the Act marine resources shall be  
13 maintained, enhanced, and where feasible restored.  
14 And there really has been no effort whatsoever to  
15 try to do that in this ruling.

16 And that the effects of entrainment must  
17 be minimized. And in order to minimize the  
18 effects of entrainment an adequate entrainment and  
19 impingement study needs to be required first. And  
20 so just echoing that.

21 Now, I'm going to pass it over to Dr.  
22 Shuman right here. But one thing I would like to  
23 emphasize is he's going to talk about the \$1  
24 million going to the Bay Restoration Commission.  
25 Is that when I testified on this last year I was

1 Chair of the Steering Committee of the Bay  
2 Restoration Commission. Currently I'm the Vice  
3 Chair of the Bay Restoration Commission.

4 And I will tell you that none of this  
5 has ever been discussed with the Commission  
6 whatsoever from the standpoint of whether or not a  
7 certain dollar amount would be adequate for either  
8 a) doing a proper entrainment study and a  
9 reference-based study, or b) which I think is even  
10 more important, is determining what the dollar  
11 amount would be that would be necessary for  
12 mitigation of the impacts caused by this project.

13 And so I just want to emphasize that as  
14 someone who literally plays that role of sitting  
15 on the decision-making body for the Bay  
16 Restoration Commission. That we literally had  
17 never heard about this until two days, I think,  
18 before the last hearing about a year ago.

19 So, with that, let me pass that --

20 HEARING OFFICER SHEAN: Excuse me, let  
21 me just ask you a question if I may. You may be  
22 the appropriate one to answer this. But I'm  
23 trying to get my arms around the concept here of  
24 the entrainment -- first of all, I guess the  
25 specific 316B type study done in order to

1 determine the extent of impacts.

2 As I look at the new federal EPA rules,  
3 it appears to me that they seem to be performance  
4 standard driven, if you will. That when they're  
5 talking about the options that are available for  
6 existing facilities, for example, with entrainment  
7 they just say reduced by 60 to 90 percent to get  
8 the equivalent of a closed cycle or recirculating  
9 system.

10 And then the second option is  
11 demonstrate meeting performance standards by any  
12 combination of design changes, operational changes  
13 or habitat restoration. Am I correct in  
14 understanding that that's the direction they're  
15 going, and this 316B or the type of studies that  
16 both the Coastal Commission and you are referring  
17 to are going in a little bit different direction?

18 DR. GOLD: Well, I can tell you right  
19 now that the Regional Board -- and Tony Rizk from  
20 the Regional Board is here if you want to ask him  
21 directly -- but the direction that the Regional  
22 Board has been going is they've been meeting now  
23 about every other month to actually discuss  
24 exactly what you're asking.

25 So I don't think there's been a

1 preconceived determination of how to interpret the  
2 regulations that literally just came out. And so  
3 whether they're just going to go in the flat  
4 reduction, which might be something that, you  
5 know, perhaps Dr. Rizk would prefer to go in that  
6 direction; or whether there's going to be the  
7 subsequent region-wide sorts of studies necessary  
8 to really determine what the impacts are in  
9 comparison to true baseline conditions on  
10 ichthyoplankton and those sorts of issues.

11 I think that remains to be seen. And  
12 it's completely speculative, I think, for me to  
13 state really exactly where that direction is going  
14 to end up.

15 HEARING OFFICER SHEAN: Okay, well,  
16 that's informative.

17 DR. GOLD: Okay.

18 MR. ABELSON: Officer Shean, just one  
19 comment on that last question you posed. I mean  
20 the Committee needs to be aware that those  
21 regulations concerning existing facilities were  
22 released, I think it's three days ago. They're  
23 490 pages long. And the subject of massive  
24 litigation that has invalidated their predecessor  
25 for the new facilities, with the press release

1 statements from groups that Santa Monica Bay is a  
2 part of, that they fully intend to litigate these  
3 issues on the same grounds.

4 So, you know, my point is simply that I  
5 think nobody knows what we've got in that area at  
6 all at this time.

7 DR. GOLD: I would also add one thing,  
8 which is that that's strictly a Clean Water Act  
9 determination. And as you've heard today, for the  
10 last three and a half hours, is that your  
11 obligation under CEQA and the Coastal Act is  
12 substantially different.

13 MR. MCKINSEY: I would indicate that  
14 we've got a disagreement with the staff on that  
15 position, as well. We think that there may be  
16 some question about whether the regulations are  
17 going to be subject to litigation. And then if  
18 they are there will be a question about whether or  
19 not that litigation succeeds.

20 But the regulations are what they are,  
21 and I thought that the characterization that Mr.  
22 Shean just made is pretty accurate, that that's  
23 what they say. They're not really a matter of  
24 interpretation, there's a matter of figuring out  
25 procedurally how you apply them. But they say if



1       you have this criteria then you will reduce  
2       entrainment by 60 to 90 percent flow, or you will  
3       meet it through equivalency of other things.

4               And I'm only saying this just because a  
5       comment was just made by -- I've been withholding  
6       a lot of my comments and rebuttal to a lot of  
7       things today. But since there was some rebuttal  
8       there, I wanted to state my opposing view.

9               DR. SHUMAN: I'm going to speak very  
10      briefly on the three proposed conditions that are  
11      in the --

12              HEARING OFFICER SHEAN: Do you want to  
13      identify yourself just for the record.

14              DR. SHUMAN: My name is Dr. Craig  
15      Shuman. I'm a Staff Scientist with Heal The Bay.

16              HEARING OFFICER SHEAN: Thank you.

17              DR. SHUMAN: And I appreciate the  
18      opportunity to speak before you this afternoon.

19              Following up on what Dr. Gold said about  
20      the Bio-1 condition of \$1 million to the Santa  
21      Monica Bay Restoration Commission, there's really  
22      no sound science that has demonstrated that that  
23      is an appropriate value. And I'm not going to  
24      belabor that. And that was expressed by staff, as  
25      well, the typical mitigation costs for other power

1 plants far exceed that value.

2 We'd also like to point out that any  
3 mitigation costs should be strictly for  
4 restoration or enhancement and not for future  
5 studies. The applicant should be required to  
6 endure all costs of studies and mitigation. And  
7 those should be separate.

8 The Bio-2, the Gunderboom feasibility  
9 study that was briefly discussed, the Gunderboom  
10 is not a proven technology, and it's definitely  
11 not appropriate for this region. It's a  
12 relatively new technology for use with  
13 entrainment. It's had limited application and  
14 it's typically for seasonal use in fresh water  
15 environments.

16 In the marine environment you present a  
17 tremendous fouling problem. The air burst system  
18 that is being researched to release the organisms  
19 off of the fabric doesn't seem to be working all  
20 that well. A recent study showed --

21 MR. MCKINSEY: I'm sorry, I want to  
22 reiterate something Mr. Abelson said earlier that  
23 this isn't a testimonial new evidence proceeding.  
24 And so I would say that to the extent you're  
25 hearing this stuff, it's comments. And I don't

1 think it's necessarily comments that we can take  
2 as an evidentiary nature. And I don't -- that  
3 this is where you wanted to hear.

4 We had a lot of evidence about the  
5 Gunderboom in the evidentiary hearings. And this  
6 party presented the testimony. If they want to  
7 say, you know, our testimony indicated this or  
8 that. But to the extent that we're bringing in  
9 new information or new testimony I have an issue  
10 with that, with our inability to cross-examine  
11 that.

12 HEARING OFFICER SHEAN: Okay, and I  
13 think my general view of it is to the extent I can  
14 recall the record from a year ago, it's  
15 fundamentally not new. I mean we have understood  
16 that there was some criticism of the Gunderboom  
17 that went to both bio-fouling of the material and  
18 other things like that.

19 So, I mean to the extent he's just kind  
20 of recapping what may be out there in the public  
21 knowledge about issues that the Gunderboom has  
22 had, it doesn't say the Gunderboom, you know, is a  
23 bad piece of technology. It's just --

24 DR. SHUMAN: And I'll conclude on the  
25 Gunderboom simply by saying that current

1       technology limits the flow rate through the  
2       Gunderboom at 10 gallons per minute per square  
3       foot. And if you do the math on that for the  
4       proposed flow rate, you'd need an area of 17,662  
5       square feet on the surface that's to be enclosed  
6       by the Gunderboom. And that's a circle with an  
7       approximate diameter of 150 feet.

8               And you can imagine that would propose a  
9       significant hazard to navigation. And the  
10      infrastructure that would be required to maintain  
11      that structure in place would be extremely  
12      significant, as well.

13             On the Bio-3, the monthly flow caps,  
14      again I don't want to belabor this point because  
15      it was referenced by staff very eloquently.  
16      There's simply no scientific justification for the  
17      chosen months.

18             The applicant stated that the largest  
19      proportion of larvae are in February, March and  
20      April. However, we have not seen any evidence to  
21      support that.

22             Various species spawn throughout  
23      essentially the entire year. You have warm water  
24      spawners, cold water spawners, and then those  
25      species that spawn the entire year. Species such

1 as the California halibut, that spawn during the  
2 summer, will not be protected in this. And the  
3 California halibut is an extremely valuable  
4 recreational species in Santa Monica Bay.

5 To close, simply there is no --

6 PRESIDING MEMBER KEESE: So what's your  
7 recommendation about month --

8 DR. SHUMAN: Monthly flow caps, I think  
9 a detailed 316B type study would be needed to  
10 determine what are the monthly impacts --

11 PRESIDING MEMBER KEESE: Before anybody  
12 decides on monthly flows at all?

13 DR. SHUMAN: I think so. I think a  
14 detailed study would be required. Because we need  
15 to know what larvae are present at the intake  
16 location throughout the year currently.

17 This needs to be grounded in reliable  
18 science. And the mitigation needs to reflect the  
19 results of that science.

20 We would ask the Commission to pursue  
21 alternative cooling options. We would dismiss  
22 this entirely if we found alternative cooling  
23 options such as the Hyperion option.

24 If not, a detailed entrainment study  
25 should be completed prior to project approval.

1 Appropriate baseline conditions should be  
2 determined. And then appropriate mitigation  
3 should be ordered for that.

4 Thank you.

5 HEARING OFFICER SHEAN: Thank you, Dr.  
6 Shuman. All right, how about the City of El  
7 Segundo, and then we'll follow that with the City  
8 of Manhattan Beach if they're still here. Mr.  
9 Garry.

10 MR. GARRY: Thank you. Most of our  
11 comments were related to just the differences we  
12 found between what we thought were the agreed-upon  
13 conditions and what were in the proposed decision.  
14 So I don't think I'll go through those.

15 I will mention that our first comment  
16 related to AQ-29 and 30. There was no particular  
17 objection to the deletion of those, but the  
18 proposed decision didn't mark those as deleted.  
19 So it was hard to determine if there was agreement  
20 at some point from what I thought were the agreed-  
21 upon conditions in December of 2002 of how those  
22 got deleted. It was very hard to track all the  
23 changes through this process.

24 HEARING OFFICER SHEAN: Can you remind  
25 me what AQ-30 -- I was trying to find it and --

1           MR. GARRY: I don't have my agreed-upon  
2 conditions section --

3           MR. ABELSON: I can.

4           MR. GARRY: -- I don't remember what it  
5 says.

6           HEARING OFFICER SHEAN: You can provide  
7 that?

8           MR. MCKINSEY: AQ-30 dealt with three  
9 particular units that the Air District -- they  
10 came about because the Air District's original  
11 draft included some language, but that they then  
12 removed. And they dealt with some equipment  
13 that's actually not going to be regulated by the  
14 air permit. I forget exactly what they're called,  
15 but they even had numbers; and it was either  
16 boilers or vent units.

17           And so ultimately the AQ-30 was a  
18 condition that had been in, I think, the second  
19 iteration of the air permit, but not the FDOC, the  
20 final iteration of it. And it was a condition  
21 thus the staff had incorporated. And in their  
22 second FSA it had been in there, and that was  
23 where the 30 came from. It was Air Quality 30 in  
24 the FSA by the staff.

25           And at the prehearing conference in

1 November we realized that equipment isn't there.

2 It was an oversight by the Air District. They had  
3 removed it from the FDOC. And so we'd agreed to  
4 remove it.

5 DR. REEDE: And staff fully agreed.  
6 That's why we said go ahead and pull it. Because  
7 that equipment is not regulated equipment.

8 HEARING OFFICER SHEAN: Okay. We'll try  
9 to explain that in our revision.

10 MR. GARRY: Okay. And several of the  
11 other conditions or comments on the conditions  
12 related a little bit to maybe some new information  
13 because we asked our fire department to look at  
14 the conditions. And they had a couple comments  
15 they suggested which we felt were fairly minor  
16 revisions that would help clarify our fire  
17 department's role in various activities. And I  
18 think those were in Haz-2 and in Waste-3.

19 DR. REEDE: Also Waste-6.

20 MR. GARRY: And Waste-6. And the rest  
21 of them were, you know, just as I said before,  
22 differences or what we found were different  
23 between the agreed-to conditions and the proposed  
24 decision.

25 MR. GARRY: No one has any questions?



1                   HEARING OFFICER SHEAN: I do. Your item  
2                   number 4, what did you want us to say that we  
3                   didn't say?

4                   MR. GARRY: Well, the discussion on that  
5                   page just doesn't acknowledge that there is an El  
6                   Segundo Beach. It makes it sound like there is --  
7                   that Dockweiler and Manhattan Beach meet at one  
8                   point. But they don't actually. El Segundo Beach  
9                   is in between them, and it should just make  
10                  reference to how access to our beach is there.

11                  HEARING OFFICER SHEAN: Okay, we got it.  
12                  And let me just, so I get it clear, your item  
13                  number 5, what did you want us to do with that?

14                  MR. GARRY: The previous condition  
15                  Socio-1 specifically listed the fire, police,  
16                  library and traffic fees that would be required.  
17                  And the condition in the proposed decision has  
18                  more generic language that says just fees, I think  
19                  to be determined by the City. And we were  
20                  concerned that that would be subject to some, you  
21                  know, debate or interpretation. Particularly  
22                  related to the traffic fee, because that's maybe  
23                  not something may not consider that a service fee,  
24                  such as the other ones.

25                  And I believe the staff provisions may

1 have also added school fees to that. But there  
2 are no school fees for projects west of El Segundo  
3 -- Sepulveda Boulevard in El Segundo. So that may  
4 not be an appropriate addition if that was  
5 changed.

6 HEARING OFFICER SHEAN: We'll work with  
7 that and try to get at least clarify; maybe we  
8 only need further clarification in our mind, but  
9 we know you have concerns about it.

10 MR. GARRY: Okay, thank you.

11 MR. MCKINSEY: We can indicate that we  
12 have no problems at all with their proposed  
13 changes as to the issue we just discovered on  
14 Socio-1. He's correct in that it's a change. We  
15 actually think the PMPD language is better, so we  
16 would say don't change it. The way you've written  
17 that condition seems to actually make it work a  
18 little better because it allows it to be more  
19 flexible and simply requires paying fees, for  
20 instance.

21 But he is correct in saying it differs  
22 from the agreed-to condition.

23 HEARING OFFICER SHEAN: Okay. But just  
24 to make sure, we either did it deliberately and  
25 that it's better. Or we'll go back to it with

1 something, a prior iteration of it. We'll look at  
2 it, though.

3 MR. GARRY: Thank you.

4 HEARING OFFICER SHEAN: Thank you.

5 MR. MCKINSEY: And he didn't mention his  
6 Trans-5, but I'll just say their proposed changes  
7 to Trans-5 are correct. There were two bullet  
8 points that were accidentally omitted that should  
9 be in from the agreed-to condition.

10 DR. REEDE: Staff agrees.

11 HEARING OFFICER SHEAN: All right.

12 Thank you, Mr. Garry.

13 All right, the City of Manhattan Beach.

14 Ms. Jester.

15 MS. JESTER: Hi. Laurie Jester, City  
16 of Manhattan Beach. Thank you.

17 We just had a few brief comments that  
18 are outlined in our letter. First of all, I'd  
19 like to thank the Energy Commission Staff. This  
20 has been a long process and we appreciate the  
21 opportunity to be here throughout it.

22 I believe that Mr. Abelson's  
23 presentation really gave a good accurate summary  
24 of how we feel about the biology issues. We do  
25 not have a biologist on staff; I am not a

1 biologist. But I believe that the information  
2 that he gave was a good summary that we all could  
3 understand and agree with.

4 It is a very important issue. And CEQA,  
5 as you know, does require that you study a project  
6 impacts and mitigate a project impacts. I think  
7 Mr. Luster gave a very good analogy with traffic.  
8 Traffic is something that is very key in our  
9 community and we certainly would not let someone  
10 build a project and then come back later and  
11 decide if they need a two-lane road or a four-lane  
12 road or freeway overpass.

13 There were a few minor revisions to the  
14 conditions of certification, land use, noise and  
15 visual. I don't really think it's necessary to go  
16 over them unless you'd like me to. They're pretty  
17 minor language changes that I believe were  
18 stipulated to previously. If you have any  
19 questions I'll be happy to answer them.

20 HEARING OFFICER SHEAN: I just have one  
21 with respect to the noise and the see attached  
22 map. Because I'm trying to recall the map and I  
23 don't know that --

24 MS. JESTER: The night-time exclusion  
25 area there specifically was a map. It was the

1 south side of the tank farm area. And it was  
2 detailed specifically on a map where that night-  
3 time exclusion area was. And we --

4 DR. REEDE: It was the landscaping map.

5 MS. JESTER: Was it landscaping?

6 DR. REEDE: The landscape plan.

7 MR. MCKINSEY: Actually, it first  
8 appeared in our tank farm plan when we were  
9 talking about noise, which was an 8.5 by 11  
10 attachment, figure some number, probably figure 1  
11 or 2, to our noise plan of a few years ago. In  
12 which we outlined A, night-time exclusion area.  
13 And the staff was basically trying to say, you  
14 know, see attached map. I think the intent was,  
15 we discussed this at a workshop on the FSA, but  
16 the intent was to refer to that map of the night-  
17 time exclusion area.

18 I don't think it appears on the  
19 landscaping plan at all, but it might. But the  
20 original source was the tank farm plan submittal  
21 which had a figure which showed not just that, it  
22 showed other aspects of how the tank farm area  
23 would be used in order to minimize noise and  
24 disturbance of neighbors.

25 And that's where it came from. And it

1 was, indeed, in the agreed-to conditions as a see  
2 attached map. And the only kind of problematic  
3 with that is the map was attached at any point.  
4 And in fact it's kind of hard, I don't know how  
5 you do it, attached figure to a condition. I  
6 guess you kind of can't. I think it might make  
7 more sense to describe specifically the document,  
8 you know, or something more. But maybe you just  
9 want to attach it. It's certainly we don't have a  
10 problem with it. It's what was agreed to.

11 HEARING OFFICER SHEAN: Okay. And you  
12 think you have a current version of that?

13 MR. McKINSEY: Sure. In fact, easily we  
14 -- I mean it's in the record, so it's on the  
15 website, --

16 HEARING OFFICER SHEAN: Well, if you can  
17 either find it or send us an electronic file, and  
18 then that will be subject to review when we get  
19 our revision out.

20 MS. JESTER: Is that it?

21 HEARING OFFICER SHEAN: That's it as far  
22 as I know.

23 MS. JESTER: All right. Thank you.

24 HEARING OFFICER SHEAN: Thank you. All  
25 right, we had Mr. Tony Rizk from the Water Board,

1 sent us a card saying he's got a clarification he  
2 wants to make. So, Mr. Rizk.

3 DR. RIZK: Good afternoon, Commissioner  
4 Keese, Members of the Committee, Officer Shean.  
5 My name is Dr. Tony Rizk -- well, leave the Doctor  
6 out, it's not important.

7 (Laughter.)

8 DR. RIZK: Dr. Reede just got -- so it's  
9 very important to him. I'm an old man.

10 (Laughter.)

11 DR. RIZK: I am Staff with the Regional  
12 Water Quality Control Board. And for about a  
13 period of two years I was serving as Energy  
14 Coordinator within our Region handling water-  
15 related issue of power plants.

16 I fully appreciate this process. And I  
17 had initially planned not to speak but to listen  
18 and learn, as by learning experience. But there  
19 were so many thing said that I felt it important  
20 to at least give a bit of my two-cents worth for  
21 clarification.

22 With that I would like to start with  
23 where does the Regional Board stand on this issue.  
24 We had put our position in official communications  
25 very clearly on that. Since the El Segundo Power

1 Plant is not making changes to the cooling water  
2 intake structure, no changes to the pumps, no  
3 changes to the duct, no changes to the cap, then  
4 they are existing under what we understand to be  
5 the 316B rules.

6 Now, in that context we also took the  
7 position we have no objection for whatever  
8 decision the Commission makes under the Warren  
9 Alquist Act in review of this case. And we  
10 provided that documentation.

11 So our position is really a bit neutral,  
12 but we're not advocates, but we're involved. And  
13 this brings me to some of the things that's been  
14 said earlier and I would just like to clarify  
15 those.

16 One is the term exclusive jurisdiction.  
17 The Regional Water Quality Control Board has  
18 jurisdiction. It is under state and federal  
19 regulations. But the word exclusive is being  
20 interpreted to mean to the exclusion of everybody  
21 else. And to me that's dictatorship, not  
22 democracy. We're not dictators. We seek and  
23 solicit the input of all the other agencies. Our  
24 Board and our Staff take the input very seriously.  
25 And we do go out of our way to address them and



1 incorporate them into our process. And this is  
2 not going to change in the next NPDES permit  
3 cycle, and not indeed any future cycles.

4 Another thing that was mentioned was  
5 that the NPDES is not a federal issue, it's a  
6 state issue. Correction with that. The Regional  
7 Water Quality Control Board is mandated, and these  
8 permits when they are issued, they are issued as  
9 an NPDES permit under federal statutes, namely the  
10 Clean Water Act. And as waste discharge  
11 requirement, WDR, under state laws and  
12 regulations. So it is joint state and federal.

13 Quite often the USEPA does not get  
14 involved in the details of our permit process, but  
15 in certain occasions they do. A good example of  
16 that is Hyperion, which is being issued as a joint  
17 NPDES permit because of its importance, and the  
18 discharge and the water issues and so forth.

19 Another example is Exxon Mobil, which is  
20 completely contained inside the State of  
21 California boundaries. When there was a violation  
22 of the effluent requirements as issued by the  
23 Regional Board, the USEPA took on the lawsuit and  
24 won the lawsuit against Exxon.

25 So we work very closely with the USEPA.

1 And that brings me to the 316B rules, basically  
2 what we call the phase two rule for existing power  
3 plants. Both USEPA and the Regional Board have  
4 deemed this project to fall under, as an existing  
5 facility, under the phase two rule. And in our  
6 communications we have provided we have indicated  
7 that in the absence of those rules having been  
8 promulgated and having from experience, because 25  
9 years ago it was original Board that was an  
10 instrument in making the power plants conduct all  
11 of these 316B studies, that right now they're  
12 being discredited for one reason or another.

13 We are a part of that process. We have  
14 every intention of requiring what is necessary to  
15 achieve compliance with the phase two rules. And  
16 that brings me to where we are as far as this  
17 facility.

18 There's really two issues here that we  
19 look at. And the workshops that Dr. Gold alluded  
20 to earlier has been, on one hand, to get people to  
21 know each other so that we can connect faces with  
22 attitudes or positions; and also to try to  
23 highlight some of the key difficulties when you're  
24 dealing with an existing structure.

25 It is very easy for us to say, oh, we

1       should put -- circulating water. But I'm an  
2       engineer and I've paid my dues, and if you talk to  
3       old engineers they will tell you, that's easier  
4       said than done. When we look at the facility we  
5       have to really look at what is realistic, not what  
6       is possible under some dream world with dream  
7       technologies.

8               In this facility this decision has not  
9       been made yet, and that's being made as we move  
10      forward in our phase two rules. There is the two  
11      path to follow, and one is the technologies, one  
12      is offset mitigation. We believe that a  
13      combination is essential.

14             Now, it's in that spirit that we felt,  
15      at least unofficially, that what's being proposed  
16      at least as a combination of looking at  
17      technologies and looking at offset mitigation is  
18      reasonable path. Quite frankly, we're a bit  
19      concerned at some of the arbitrariness in this  
20      process. A demonstration of the Gunderboom  
21      technology is warranted. We don't have experience  
22      of it in our region.

23             The Los Angeles Region, which covers Los  
24      Angeles and Ventura, we have nine power plants.  
25      We have almost half of the coastal power plants in

1 the State of California. We have a vested  
2 interest in having El Segundo pay for a  
3 demonstration that will let us know is this  
4 technology useful or not. Is this the way to go  
5 or not.

6 In addition, as Dr. Gold also pointed  
7 out correctly, the Santa Monica Bay Estuary is  
8 impaired. But the word estuary is a bit  
9 misleading, because this is the biggest estuary in  
10 the world. It is a huge -- it's an ocean. And we  
11 do look at it from that context. And when we look  
12 at that we need to consider the options for offset  
13 mitigation. Is the correct offset mitigation 1  
14 million, 10 million, 20 million or 50 million?  
15 This, as we have articulated previously, we leave  
16 that to your discretion and we will not object to  
17 your decision.

18 But, what we may suggest and we had  
19 proposed this back in December 2002, in one of the  
20 workshops. And I believe the Presiding  
21 Commissioner at that time recommended that. That  
22 both parties contact the Santa Monica Bay  
23 Restoration Commission or the Regional Water  
24 Quality Control Board and try to set up a workshop  
25 or a mini-workshop between the interested parties

1 to really debate this issue in a constructive  
2 environment, face to face, not advocating any one  
3 particular position. But to try to pin down what  
4 would be a reasonable mitigation measure, or  
5 offset mitigation measure as is appropriate. Turn  
6 it around, come back to the Commission with a  
7 recommendation.

8 The hearings we had in February, this  
9 issue never came up. Right now as it's being  
10 debated I would like to -- bring up the Presiding  
11 Committee Members at that time recommendation of  
12 having these parties go, in this case, to Santa  
13 Monica Bay Restoration Commission; sit down  
14 without preconceived notions or prejudices; and  
15 really look at what can be a reasonable, not  
16 necessarily a dollar figure, but what would be a  
17 reasonable level of effort that would address  
18 these concerns.

19 Whether there is a need for a study or  
20 not is debatable. But I can tell you this, a  
21 study is one data point in time. The biology in  
22 our Bay, and the biologists would most likely  
23 agree with me on this, have a cycle of about 20,  
24 30 years. Thus, to take one data point in time  
25 and hang all of our hats on it, we don't think is

1 very prudent.

2 The phase two rules are saying 90  
3 percent reduction. Maybe what we need to be  
4 looking into is how can we achieve that 90 percent  
5 reduction with an envelope of error and  
6 uncertainty that the study may or may not  
7 quantify.

8 And with that I hope I didn't add fire,  
9 oil to the fire, or confuse us even more than we  
10 already are. And thank you.

11 HEARING OFFICER SHEAN: I think it was  
12 light, not just heat, so, thank you.

13 DR. RIZK: Thank you.

14 HEARING OFFICER SHEAN: Thank you, Dr.  
15 Rizk.

16 All right, we have a couple other people  
17 who have requested to speak here. What we're  
18 going to try to do is conclude this in the next  
19 15, 20, 25 minutes so we can take a dinner break,  
20 and then come back for our evening session at 6:00  
21 where we're going to be available to members of  
22 the public.

23 Murphy-Perkins agreed to come back at  
24 6:00. And if there's some other people who would  
25 like to speak, that's what we're going to attempt

1 to accommodate, if we can't do it now before we do  
2 a recess.

3 MR. MCKINSEY: Hearing Officer Shean, I  
4 would like an opportunity to rebut a specific  
5 point made by Mr. Abelson in his remarks. I don't  
6 know when you want to do that. I think we can  
7 surely submit comments regarding other things, but  
8 there was something that I think you paid great  
9 attention to and it has become pretty relevant,  
10 and we have a pretty strong disagreement with how  
11 it was described.

12 It will only take a few minutes,  
13 whenever you want to accomplish it tonight. But I  
14 did want to accomplish that.

15 HEARING OFFICER SHEAN: All right. We  
16 have -- let's see, Mr. Bill Eisen, is he still  
17 here? Yes, sir, if you'd like to come up, please.

18 MR. EISEN: I'd like to speak now  
19 because I think it's relevant to what we've been  
20 talking about.

21 HEARING OFFICER SHEAN: You bet. And  
22 you've been very patient, thank you.

23 MR. EISEN: Thank you. My name is Bill  
24 Eisen; I'm a spokesman for a community group in  
25 Manhattan Beach called Residents for a Quality

1 City. I'm also a licensed SCUBA diver and a  
2 member of our -- members of our group are also  
3 licensed SCUBA divers and dive frequently in the  
4 South Bay in the vicinity of Manhattan Beach and  
5 the power plant, and also in the Santa Monica Bay.

6 We concur with the February 20, 2004  
7 letter from the Executive Director of the Coastal  
8 Commission. There has been a substantial decline  
9 in the number of fish and marine organisms in the  
10 Santa Monica Bay during the past several decades.

11 We believe that this may be due, in  
12 part, to the entrainment of marine organisms in  
13 the intake pipes of the El Segundo Generating  
14 Facility.

15 With respect to the PMPD I'd like to  
16 emphasize two points, which under the PMPD --  
17 which render the PMPD fatally defective. First,  
18 the PMPD does not establish a biological baseline  
19 for marine organisms in the vicinity of the El  
20 Segundo Power Generating Station in the Santa  
21 Monica Bay. Therefore, without knowing how the  
22 plant's intake of ocean cooling water is affecting  
23 marine organisms, any discussion of a baseline for  
24 cooling water is virtually meaningless.

25 Secondly, as noted on page 54 of the



1 PMPD the Coastal Commission adopted on November 6,  
2 2002, a report to the CEC that, one, the Hyperion  
3 wastewater alternative appears feasible; and two,  
4 if the CEC does not require the wastewater  
5 alternative, a 316B-like study needs to be  
6 conducted in order to determine conformity to the  
7 Coastal Act. This study needs to be done in order  
8 to establish a biological baseline.

9 The reason that it needs to be done  
10 before the issuance of a CEC permit is so that  
11 appropriate mitigation measures may be devised  
12 before the start of construction. For example,  
13 the amount of cooling water needed to cool the  
14 facility operating under full power is directly  
15 proportional to the rate of flow.

16 So a lower flow results in a higher  
17 temperature of the discharged cooling water. So  
18 in order to keep the temperature of the discharge  
19 cooling water within legal limits, a larger  
20 cooling condense would be required.

21 So in order to determine the size of the  
22 cooling condenser that would be needed, we need to  
23 have a 316B-type study in order to establish a  
24 biological baseline that would be helpful in  
25 determining an appropriate flow rate.

1           Obviously it would be infeasible to  
2       change, or would be very impractical to change  
3       that size of the condenser after construction is  
4       already started. It makes infinite sense to  
5       basically a 316B study before we approve the plans  
6       for the permit because all of this might result in  
7       changes in the actual design of the facility.

8           Further, the plain language of PRC  
9       25523(b) in this instance effectively requires the  
10      Hyperion alternative or the 316B-type study unless  
11      the Commission finds these provisions to be  
12      infeasible. With respect to a 316B-type study,  
13      the PMPD fails to refer to substantial evidence in  
14      the record showing a 316B-type study to be  
15      infeasible.

16           Then I'd like to point out just briefly,  
17      regarding jurisdiction of the relevant agencies it  
18      is clear that there are overlapping jurisdictions.  
19      But unless there is a conflict in what will be  
20      required as to mitigation measures, any debate as  
21      to which any agency, any particular agency has  
22      jurisdiction over particular issues is, I believe,  
23      at this time premature.

24           Thank you.

25           HEARING OFFICER SHEAN: Thank you, Mr.

1 Eisen. Okay. Mr. Nickelson, do you want to go  
2 now, or --

3 MR. NICKELSON: I can do this after,  
4 this evening, if you'd rather, if you'd like to  
5 break.

6 HEARING OFFICER SHEAN: Yeah, actually  
7 we'd probably prefer that.

8 MR. NICKELSON: Okay.

9 HEARING OFFICER SHEAN: All right.

10 MR. NICKELSON: I'm sure you would.

11 HEARING OFFICER SHEAN: Do you want to  
12 do yours now?

13 MR. MCKINSEY: Yeah, it'll be quick.

14 HEARING OFFICER SHEAN: All right.

15 Okay.

16 MR. MCKINSEY: Mr. Abelson, Staff  
17 Counsel, characterized the record regarding any  
18 statements about possible flows that we've never  
19 suggested that flows could be lower or higher.  
20 And he gave out some numbers around 150 million  
21 gallons.

22 The numbers he was getting were the  
23 numbers that the staff developed when they were  
24 evaluating the alternative cooling option. They  
25 were flows that would be using the Hyperion

1 discharge water.

2 And on page 42 of our direct written  
3 testimony, and this is just an example, we  
4 actually said that, no, you've got it wrong; it's  
5 not 150, it's 2000 million gallons per day, or 2  
6 billion gallons per day, using their coolest water  
7 during the wintertime. And it's not even  
8 calculable during the summertime.

9 So we actually have some direct  
10 testimony that says something very different. And  
11 I'm only speaking at a point where he  
12 characterized some testimony about how we have  
13 never really characterized necessary flows. We  
14 certainly seek permit of the plant at 200 million  
15 gallons per day. But as soon as we started  
16 talking about using different temperature water,  
17 we showed some very specific numbers that were the  
18 rebuttal numbers to the numbers he provided, about  
19 150, because they were about the alternative  
20 cooling. They were not about what kind of flows  
21 were possible using the cooling system using ocean  
22 water at all. They were really about the  
23 alternative cooling system.

24 PRESIDING MEMBER KEESE: And that was  
25 the point on which, I believe, Commissioner

1       Pernell made the decision that the Hyperion was  
2       infeasible because of the temperature and flows  
3       that would be required. I think that's on the  
4       record.

5               MR. ABELSON: If I could just speak on  
6       record on that point. Two things. First of  
7       all, --

8               PRESIDING MEMBER KEESE: As I said  
9       earlier, hearing 100 and 200 over here leaves me  
10      assigning some people a search of the records.

11              MR. ABELSON: Sure. Well, two things.  
12      First of all, Commissioner Pernell hasn't made any  
13      decision in this case at all.

14              PRESIDING MEMBER KEESE: No, I'm  
15      sorry, --

16              MR. ABELSON: He was not here --

17              PRESIDING MEMBER KEESE: -- a  
18      recommendation.

19              MR. ABELSON: Right. He didn't even  
20      make a recommendation on it. And on the facts,  
21      the fact that I was pointing out to you earlier,  
22      Chairman, was that -- and I'd like to call your  
23      attention, because I know Officer Shean is  
24      interested, it's part of his questions, as to, you  
25      know, what the various monthly caps and annual

1 caps would be.

2 Exhibits 16 and 17, which are  
3 uncontested and are part of the record, basically  
4 established the monthly caps that would be  
5 required under staff's alternative views of the  
6 appropriate baseline. We prefer the zero  
7 baseline. I've conceded today to the Committee  
8 that the normal rule of the historic baseline  
9 would probably be legally sufficient, if that's  
10 where the Committee goes.

11 So I want to call your attention for the  
12 purposes of responding to my good friend, Mr.  
13 McKinsey's, point, to exhibit 16, which is an  
14 attachment; it was in evidence. And if you look  
15 across -- do you all have that? I have extra  
16 copies if --

17 PRESIDING MEMBER KEESE: I've got it in  
18 front of me.

19 MR. ABELSON: You do have it, okay. If  
20 you look across basically the third line, the one  
21 that says intake totals daily average beginning  
22 with the number 279. Are we all on the same page?

23 If that becomes your chosen baseline and  
24 the related monthly caps that we would, in effect,  
25 find at least acceptable, you're looking at the

1       smallest daily average anywhere on that line being  
2       268 million gallons per day, ranging up to -- and  
3       that's in the month, I believe, of March --  
4       ranging up to as high as 458 million gallons per  
5       day average in the month of September, or maybe --  
6       excuse me, 477 in August.

7               My point, number one, is that even if  
8       you accept Mr. McKinsey's statement that his  
9       project needs 200 million gallons to operate,  
10      there's not a single day of the year that we  
11      aren't giving them the 200 and then quite a bit  
12      more.

13             What we did have in the record was the  
14      indication, admittedly for the sewage treatment  
15      alternative the sewage treatment alternative  
16      brings in warmer water, you actually need more  
17      water with the sewage treatment alternative than  
18      you do with the direct ocean water, which is  
19      what's now being considered, the sewage treatment  
20      alternative indicated that you needed 150 million  
21      gallons per day maximum.

22             You probably need a lot less than that,  
23      maybe as little as 100 million gallons a day, to  
24      operate this plant flat-out, 24/7, using the cold  
25      water from the ocean that's now being discussed.

1           But even if you take the worst case,  
2   Chairman, which is their assertion that they have  
3   to have 200 million, and there's no evidence in  
4   the record to that effect. I mean that is not  
5   established as an engineering matter, that's  
6   simply an assertion. But even if you accept it,  
7   go across that line in exhibit 16, line 3  
8   beginning with 279 and ending with 288, and there  
9   isn't a day of the year that they don't have well  
10   in excess of what they need to run that plant  
11   flat-out, 24/7/365.

12           PRESIDING MEMBER KEESE: Refresh my  
13   memory, then, because I see for instance in August  
14   we have a number of 477.

15           MR. ABELSON: Correct. So that month  
16   you --

17           PRESIDING MEMBER KEESE: Sounds like  
18   under the new scenario they couldn't use 477.

19           MR. ABELSON: Well, what 477 basically  
20   provides is this. Again, if you take Mr.  
21   McKinsey's assertion as fact, that they have to  
22   have 200 for the new facility, that leaves them  
23   with 277 million gallons per day. That's baseload  
24   capacity, or very close to it, for 3 and 4. And  
25   it would be somewhere between baseload and



1 intermediate, depending on how they choose to use  
2 the -- you got an additional, above and beyond the  
3 200 that they claim that they need for the new  
4 facility, you've got an additional in August,  
5 which is when we do need power in the state  
6 typically because of heat and so on, you've got an  
7 additional 277 million gallons available for the  
8 second unit above and beyond anything that we  
9 need.

10 So that was the only point that --

11 PRESIDING MEMBER KEESE: Well, I'm sure  
12 if there is a number in the records applicant will  
13 point it out to us in their next filing.

14 I would point out that there is, you  
15 know, that I am aware that peaking plants are not  
16 only necessary during the hottest months of the  
17 summer, but that for instance that some of the  
18 worst months that occurred during the crisis  
19 occurred when we had 15,000 megawatts of  
20 generation out for repair. And we had no peaking  
21 plants that were available.

22 And so historically there has been a  
23 need, when baseline is out, for peakers at other  
24 times of the year. And January and February were  
25 actually pretty bad months.

1           MR. ABELSON: Right, and again, our only  
2 point there is that even if you take the point you  
3 just made, that 279 which is January, 280 which is  
4 February, 268 which is March, and remember these  
5 are averages. I mean you don't normally have a  
6 peaking problem every day of the month.

7           PRESIDING MEMBER KEESE: I understand  
8 that.

9           MR. ABELSON: Right. But you'd still  
10 have somewhere between 68 and 79 million gallons  
11 per day above what you need, assuming that this  
12 assertion about 200 was correct.

13          DR. REEDE: What Mr. Abelson is also  
14 saying goes to the point of reducing the flows and  
15 using a larger condenser so that the plant has  
16 operating --

17          PRESIDING MEMBER KEESE: I've heard that  
18 a couple times. Did we get evidence on that  
19 during the hearing? On the size of the condenser  
20 and the amount of --

21          MR. MCKINSEY: Only in the context of  
22 the alternative cooling proposal. These numbers  
23 here have to do with something different than the  
24 other numbers, but only numbers and only  
25 discussions about condenser design all came up in

1 the context of the alternative cooling proposal.

2 PRESIDING MEMBER KEESE: Thank you.

3 MR. ABELSON: Which is always the worst  
4 case because you're dealing with warmer water to  
5 begin with. I mean the stuff we're talking about  
6 now would actually make it easier on the  
7 applicant.

8 HEARING OFFICER SHEAN: Mr. Abelson, am  
9 I correct, though, as I look at those numbers to  
10 believe that each of the ones that represent the  
11 totals of intake basically are driven by the  
12 response to electricity demand, as opposed to  
13 anything having to do with spawning periods,  
14 numbers of fish present, the spawning cycles of  
15 various fish? Isn't it all driven by response to  
16 electricity demand and perhaps response to  
17 necessary repairs to the various facilities?

18 MR. ABELSON: You know, I have no idea  
19 what motivated the applicants at different times  
20 to run their power plants. But I certainly  
21 concede your basic point that these numbers are  
22 not something that was derived specifically based  
23 on biological studies to protect fish.

24 What they do establish is your baseline  
25 for CEQA purposes, now we're repeating ourselves,

1 but basically they are -- what we are saying is if  
2 you hold it at this level, this is the historic  
3 level. And we can say for CEQA purposes you  
4 aren't making it any worse. You've basically  
5 satisfied your CEQA requirement.

6 You still have the residual Coast Act  
7 issue of restore and enhance, and what's required  
8 to do that. But if you do this, I'm conceding the  
9 issue that you asked earlier which is the normal  
10 baseline is at the time of filing. So that would  
11 be --

12 PRESIDING MEMBER KEESE: Let me ask you  
13 one question. Restore and enhance. Even if there  
14 is no change in anything it is in the coastal  
15 waters?

16 MR. ABELSON: Yes, actually thank you  
17 for asking that, --

18 PRESIDING MEMBER KEESE: Because of --

19 MR. ABELSON: Yeah. There's three words  
20 in the Coastal Act and they're very very different  
21 than the words that are involved in the CEQA. The  
22 three words that are critical are if you're in the  
23 coastal zone and you're seeking a permit you must  
24 maintain, which is what this is, restore, restore,  
25 and enhance to the extent feasible.

1           So I think the question you're asking is  
2           if you maintain is that good enough for the  
3           Coastal Act because you haven't made it any worse.  
4           And the answer is no, you need to go further and  
5           restore and enhance.

6           PRESIDING MEMBER KEESE: But it's the  
7           question of jurisdiction which we struggle with a  
8           little bit here, and with the local coastal plan  
9           controls.

10          If we're putting no more volume out, and  
11          we're not adjusting the pipeline that goes out,  
12          and we're not adjusting the intake structure so  
13          that all the construction is above the waterline,  
14          does that still put jurisdiction outside --

15          MR. ABELSON: I think the answer is  
16          first of all the Coastal Commission has already  
17          told you that it does. That's their position.

18          But I think staff would have the same --

19          PRESIDING MEMBER KEESE: But they're  
20          also arguing that we're not within the baseline.

21          MR. ABELSON: Right, but basically I  
22          think the way we would look at the question that  
23          you're asking is that you are now building a new  
24          facility. The facility that's out there right now  
25          isn't pumping anything. It isn't even operating.

1 It's closed, legally and factually.

2 MR. MCKINSEY: That's not in the record  
3 and it's false.

4 HEARING OFFICER SHEAN: And why don't  
5 you just jump beyond that, because I think that  
6 doesn't necessarily address the Chairman's  
7 question.

8 MR. ABELSON: No, no, because I'm trying  
9 to answer the Chairman's question, and if Mr.  
10 McKinsey wants to clarify --

11 MR. MCKINSEY: Well, I can rebut a lot  
12 of other things you've said today, but I just want  
13 to say that right now, because it is totally  
14 false. The system is operating right now as we  
15 speak, so.

16 MR. ABELSON: The comment that I made  
17 was that the generating facility that's out there  
18 right now is legally closed; it doesn't have a  
19 permit, okay.

20 MR. MCKINSEY: I object again. It has a  
21 permit. It has an NPDES permit --

22 PRESIDING MEMBER KEESE: Let's --

23 MR. MCKINSEY: -- that allows it to  
24 operate, and it is operating.

25 PRESIDING MEMBER KEESE: Let's stick to

1 the specific question I'm asking about --

2 MR. MCKINSEY: And false --

3 PRESIDING MEMBER KEESE: -- about --

4 DR. REEDE: -- generating electricity --

5 MR. ABELSON: Right, they're not  
6 generating --

7 PRESIDING MEMBER KEESE: -- the  
8 waterline, the waterline and if that determines  
9 the --

10 MR. ABELSON: And I think that what the  
11 Coastal Commission is saying and what I believe  
12 staff was saying is this, is that you are actually  
13 changing the circumstances when this permit  
14 issues, okay. What you're doing is basically  
15 building a brand new power plant out there.  
16 You're remodernizing it, if you prefer, or  
17 modifying, however you -- whatever term you want  
18 to use, but you're repowering. You are now  
19 extending the life of this facility for somewhere  
20 between 25 and 50 more years.

21 So the question is realistically,  
22 knowing that markets are competitive, knowing that  
23 the existing facility has no air quality permit  
24 and is not allowed to generate electricity, that's  
25 what I'm trying to say. If it's been

1       misconstrued, I'm sorry.

2               Knowing that, knowing that it is so old,  
3       so inefficient that it isn't even running today  
4       for electricity purposes, when you, as an agency,  
5       are asked can we grant a license for the facility  
6       in question, you're basically being asked can we  
7       now extend the impacts for somewhere between 25  
8       and 50 years.

9               And that is a change in circumstance.  
10       And I think that's what the Coastal Commission,  
11       perhaps our intervenors from Save the Santa Monica  
12       Bay and so on are trying to say, this is not  
13       simply the existing conditions.

14              HEARING OFFICER SHEAN: But is that  
15       difference recognized in CEQA? Can you point to  
16       any provision in CEQA that says that that  
17       constitutes a change that's legally recognizable  
18       under CEQA?

19              MR. ABELSON: Mr. Shean, I wasn't  
20       addressing CEQA. The Chairman's question went to  
21       the Coastal Act and whether they would have  
22       jurisdiction assuming we held the baseline.

23              HEARING OFFICER SHEAN: Well, then let's  
24       keep going with the Coastal Act, and knowing we  
25       want to get to some dinner here.



1           If we've taken care of the CEQA issue  
2           and at least on the issue of maintained, I'm not  
3           asking you to agree, but let's hypothetically say  
4           that so long as you maintain the status quo with  
5           respect to withdrawal of water you are  
6           maintaining, now we're left with restore and  
7           enhance.

8           Now, I guess the other question that  
9           comes up is well, is this just a question of how  
10          does this Commission or even the Coastal  
11          Commission determine what is the extent of  
12          restoration that's required, given that you're  
13          maintaining the status quo, and what is the extent  
14          of enhancement that would be required to conform  
15          to the Coastal Act?

16          Are there benchmarks in the Act? Are  
17          there prior decisions that help define that? And  
18          does the staff of the Energy Commission know an  
19          answer to those two questions?

20          MR. ABELSON: Well, the standard is  
21          clear in the Act. You have to restore and enhance  
22          to the extent feasible. You have to minimize  
23          entrainment impacts to the extent feasible. Those  
24          are in the Coastal Act. They are they standard.

25          I'm not familiar personally --

1           PRESIDING MEMBER KEESE: And that's of  
2           the operation as a whole, not of the segment on  
3           which you're doing, because all the repowering is  
4           taking place above the waterline essentially. And  
5           none of the repair repowering is taking place in  
6           the area off the water line. And we're not going  
7           to put as much water out as we did in the past  
8           under some scenarios.

9           MR. ABELSON: Right.

10          PRESIDING MEMBER KEESE: So does that  
11          mean we just have to repair and enhance onshore?

12          MR. ABELSON: No, --

13          PRESIDING MEMBER KEESE: Or does it also  
14          mean --

15          MR. ABELSON: -- you have to --

16          PRESIDING MEMBER KEESE: -- we have to  
17          look at the whole --

18          MR. ABELSON: Yeah.

19          PRESIDING MEMBER KEESE: -- all the  
20          impacts that it has everywhere, and --

21          HEARING OFFICER SHEAN: I didn't  
22          understand you to say that the enhance and restore  
23          was anything other than to the extent feasible.

24          MR. McKINSEY: Well, that's certainly  
25          the terms of the standard --

1 HEARING OFFICER SHEAN: Okay, now, does  
2 that relate to a proportion of the impacts of this  
3 project? to the larger environment? Do you take  
4 it as a percentage of taking Scattergood or some  
5 other thing in mind?

6 Because if I understand to the extent  
7 feasible, then this applicant is responsible for  
8 the restoration and enhancement of the -- some  
9 amount of the coastline or all of Santa Monica Bay  
10 simply because that's, you know, feasible to  
11 restore and enhance some of that.

12 MR. ABELSON: The Energy Commission  
13 Staff has never taken the position. We just  
14 articulated, I don't believe the --

15 HEARING OFFICER SHEAN: Well, then how  
16 does this Commission define --

17 MR. ABELSON: If I could answer your  
18 question? What we have said is that the applicant  
19 is responsible for restoring and enhancing the  
20 entrainment and impingement impacts that its  
21 project is currently causing to the extent that it  
22 is feasible to do so.

23 We have further said that one cannot  
24 determine with any precision what needs to be done  
25 without a current 316B-like study because you

1 don't know if it's bass that are being killed out  
2 there or trout, to use a kind of a very general  
3 way of looking at it; whether it's 10,000 bass or  
4 50,000 trout. And until you know that you can't  
5 know exactly what's necessary to compensate.

6 No, they're not responsible for all harm  
7 that's occurring in Santa Monica Bay. We've never  
8 argued that. I don't think the law would support  
9 that.

10 HEARING OFFICER SHEAN: Okay, then how  
11 does the Commission, when it looks at whether or  
12 not there is or is not compliance with that  
13 provision of the Coastal Act know whether or not  
14 anybody's idea complies or fails to comply?

15 MR. ABELSON: Well, the answer that  
16 every party basically has recommended with the  
17 exception of the applicant is that you should get  
18 a study. There is a debate about whether you can  
19 do it before licensing or after licensing. And I  
20 understand Save Santa Monica Bay, the Coastal  
21 Commission and others have said you need to do it  
22 before.

23 I believe that one can fashion a  
24 reasonable legal argument that if the mitigation  
25 is secured up front at a maximum dollar level,

1 which is always going to be your upper level.

2 It's never going to be more than the applicant can  
3 afford, because that's the limit of the law.

4 If you secured that and put it in trust  
5 then I think that the spirit and the essence of  
6 the restore and enhance provision has been met.

7 And in terms of determining precisely  
8 what you need to do, you complete your study; you  
9 complete it before operation begins, but after  
10 licensing. So that you do let the plant go ahead.

11 HEARING OFFICER SHEAN: Well, what I'm  
12 hearing you say is that feasible, then, for  
13 restoration and enhancement, is just how much you  
14 can take out of their treasury until they can't  
15 afford no more, is that correct?

16 MR. ABELSON: I think that the  
17 definition of feasible is limited to two levels.  
18 I think that you absolutely cannot take, under the  
19 law, more than they can feasibly afford. I think  
20 that is a correct statement as far as it goes,  
21 okay.

22 But I think it's only half of the test.  
23 You cannot take from them everything they can  
24 afford, regardless of whether they're causing a  
25 problem or not. And that's why we have the trust

1 account, okay.

2 Because -- I addressed this earlier, and  
3 I'm sorry to repeat myself, but if we determine  
4 they can feasibly afford 25 million as an economic  
5 business matter, and so we put 25 million in  
6 trust. And then we complete the study over the 15  
7 months or so that would immediately follow the  
8 licensing. And the study says, in fact, there's  
9 only about \$10 million worth of mitigation needed  
10 in this case; there are problems, they're not that  
11 severe, but they do need to be addressed. Then  
12 you --

13 PRESIDING MEMBER KEESE: Because of this  
14 project?

15 MR. ABELSON: Yes. Because of what the  
16 project is causing. Then they are not required to  
17 fix something -- this is back to your question a  
18 moment ago, Officer Shean -- they're not required  
19 to fix something they didn't cause.

20 So if the study says their damage is 10  
21 million in offsite mitigation costs, and we put in  
22 trust what we know is the outer feasible limit of  
23 25 million, they're entitled to have a rebate of  
24 the full 15.

25 PRESIDING MEMBER KEESE: But you're

1 going to a zero baseline right now.

2 MR. ABELSON: Well, --

3 PRESIDING MEMBER KEESE: You're saying  
4 if we find any impact that we see from the  
5 operation as a result of this study should be  
6 mitigated to their ability to pay. Is that --

7 MR. ABELSON: I think what you're saying  
8 is --

9 PRESIDING MEMBER KEESE: -- the standard  
10 that --

11 MR. ABELSON: -- correct, but I'd like  
12 to clarify the way you're saying it, because I  
13 think there's a tendency to confuse concepts.

14 I think what you're saying is correct.  
15 But the notion of baselines is something that's  
16 core to CEQA, okay. Once you've met the baseline  
17 requirements CEQA's done, baseline is done, okay.  
18 That's maintain under the Coastal Act.

19 But the Coastal Act does require you to  
20 go further. The term baseline doesn't come up.  
21 And that's my only semantic equivalent of what you  
22 said. The Coastal Act does require you to do more  
23 than maintain. It requires you to restore --  
24 restore and enhance to the extent feasible.

25 So, yes, once you've met the baseline

1       you still have additional legal obligations  
2       limited by the definition of feasibility, which is  
3       both an economic definition and a scientific  
4       definition.  You're not responsible for things you  
5       didn't do.

6               PRESIDING MEMBER KEESE:  Okay, thank  
7       you.

8               MR. McKINSEY:  I've got a 30-second --

9               HEARING OFFICER SHEAN:  Sure.

10              MR. McKINSEY:  -- on CEQA, and it's also  
11       going to relate to the California Coastal Act.  
12       And it's really at the heart of the matter and it  
13       relates to exactly something Mr. Abelson said,  
14       where he said that we must restore and enhance  
15       where feasible when you're seeking a permit.

16              And I think it relates directly to that  
17       issue about whether or not this project seeks a  
18       permit for something going on below the waterline,  
19       and whether or not there is any type of scope of  
20       the project that falls within the underneath-the-  
21       waterline aspects.

22              I think the California Environmental  
23       Quality Act tells us something here, that it is a  
24       separate law.  But the actual thing it says is not  
25       a project change or an effect.  It says a physical



1 change. That's what the CEQA guidelines say. A  
2 physical change is something that triggers some  
3 type of mitigation.

4 This project makes no physical changes  
5 below the waterline. The most you can come up  
6 with is an argument that there's some potential  
7 for increased flows. We've never conceded that  
8 flows are a physical change. We've maintained the  
9 scope of this project does not include things that  
10 go on below the waterline.

11 And that's been our position. I just  
12 want to help you understand that.

13 PRESIDING MEMBER KEESE: Thank you.  
14 Okay. I think that's enough. I'm sure you'll  
15 have additional brilliant thoughts during dinner,  
16 and want to raise them again.

17 We'll break now and we're going to give  
18 you an hour, so we'll come back at 6:20. Mike,  
19 you'll have to be here to tell somebody who shows  
20 up at 6:00 that we will be reconvening.

21 So we'll start with public comment at  
22 6:20.

23 (Whereupon, at 5:23 p.m., the afternoon  
24 session was adjourned, to reconvene at  
25 6:20 p.m., this same evening.)

## 1 EVENING SESSION

2 6:17 p.m.

3 HEARING OFFICER SHEAN: We had a request  
4 prior to our break of Michelle Murphy and Bob  
5 Perkins, as well as Richard Nickelson, to speak  
6 after we resumed. So, since you're all seated  
7 together, why don't you draw the short straw and  
8 come on forward.

9 MR. PERKINS: Intervenor Bob Perkins.

10 DR. REEDE: Excuse me, may I check the  
11 phone and see if anybody's on it?

12 HEARING OFFICER SHEAN: Sure.

13 MR. TOMASHEFSKY: Is there anybody on?

14 DR. REEDE: Is there anyone on the  
15 telephone? Well, --

16 UNIDENTIFIED SPEAKER: The tenth caller  
17 wins.

18 (Laughter.)

19 HEARING OFFICER SHEAN: Okay.

20 UNIDENTIFIED SPEAKER: Is it a live  
21 line?

22 DR. REEDE: No. Nobody was on it. I  
23 turned it off. You know, we're in a budget  
24 squeeze right now, so --

25 HEARING OFFICER SHEAN: All right. So

1 nobody needs to be careful what they say. Okay.

2 MR. PERKINS: That's lucky.

3 HEARING OFFICER SHEAN: Yeah.

4 MR. PERKINS: I want to address a couple  
5 of things --

6 HEARING OFFICER SHEAN: Why don't you,  
7 just for the record --

8 PRESIDING MEMBER KEESE: For the record.

9 MR. PERKINS: Right. Bob Perkins,  
10 Intervenor.

11 I want to address a couple of things,  
12 and first the stipulated conditions, which I  
13 appreciate Chairman Keese indicated some  
14 correction will be done about that. I want to  
15 emphasize the importance of that to the residents  
16 and the cities involved, at least the City of  
17 Manhattan Beach.

18 I'm not an expert on biologics or on  
19 most of the large issues in this case. But there  
20 were a number of residents and cities involved,  
21 and we know more about the impact of dirt, dust,  
22 noise, debris on our lives while this thing is  
23 being built and after it's built than anybody.

24 And we negotiated in good faith, and it  
25 took a lot of effort and a lot of time, and we

1       cared a lot. And we were damned if we were going  
2       to give up on certain things, and we were willing  
3       to give up on other things. And we would have  
4       litigated. We were prepared to litigate until  
5       promises were made to us that if we agreed to  
6       stipulated conditions, those conditions would be  
7       in the record. And they would be part of the  
8       conditions of construction. And they aren't  
9       there.

10               So, my feeling is hopefully that's a  
11       clerical error having to do with having the wrong  
12       disk and so on and all of that will get fixed. I  
13       just want to be very clear that if something else  
14       is going on, you know, we are not going to accept  
15       that. That's not acceptable.

16               PRESIDING MEMBER KEESE: Nothing else is  
17       going on. We're going to get back to -- I think  
18       everybody seems to be in agreement, we're going to  
19       do our utmost to get back there.

20               We do want you to take another look at  
21       it, because we're going back to where we think we  
22       should have been, and --

23               MR. PERKINS: Right.

24               PRESIDING MEMBER KEESE: -- get back to  
25       us.

1           MR. PERKINS: And understanding that  
2           clerical errors can happen, and it's even  
3           imaginable that there will be an error in the fix  
4           of the error, it's happened to me in my life, I  
5           would urge that a scheduling arrangement be made  
6           so that people get a chance, the City of Manhattan  
7           Beach and the residents, in particular, is who I'm  
8           concerned about, but that everybody gets a chance  
9           to look at what the Commission actually thinks the  
10          stipulated conditions are before it's too late to  
11          fix them in this proceeding.

12                 Having said that, I will trust to you  
13          gentlemen's good will and sense of fair play that  
14          you will get -- you'll either delay sending it off  
15          to the full Commission for decision, or you'll  
16          speed up the process so that we do have a shot at  
17          getting it right before we have to deal with some  
18          other way of trying to straighten it out.

19                 HEARING OFFICER SHEAN: And that's  
20          correct.

21                 MR. PERKINS: And then having said that  
22          I'm not -- thank you very much, I appreciate  
23          that -- having said that, I think Nick is likely  
24          to bring up a couple that are particularly  
25          sticking in his craw, and maybe Dr. Reede or

1 someone might want to pay real close attention to  
2 those and make sure that those are particularly  
3 addressed.

4 But I'll move on to something that I  
5 don't know as much about, and that's the biologics  
6 problem, ocean biologics problem. It is clear  
7 that if you build this plant there's some good  
8 stuff, you know, we're going to get some energy,  
9 which the state needs. And there's some bad  
10 stuff; it's going to do some damage to the ocean  
11 environment.

12 Everybody knows the applicant is not  
13 denying that more fish will die when this plant is  
14 running than when it isn't. And, in fact, one  
15 measure of that, and I'm not practicing law these  
16 days, either, so I shouldn't ought to be citing  
17 cases to you that I've read once, but there's a  
18 decision just this month called Riverkeeper v.  
19 U.S. Environmental Protection Agency in the Second  
20 Circuit Court of Appeals, decided February 3rd,  
21 docket number 02-4005. I don't know if it has a  
22 Fed.2d kind of cite yet. But it has that one, you  
23 can find it that way.

24 And if I understand that case correctly,  
25 I'll emphasize that that's regulations drafted by

1 a Republican Administration, being reviewed by the  
2 Second Circuit Court of Appeals which we all know  
3 is not quite as liberal about environmental issues  
4 as the Ninth Circuit Court of Appeals.

5 And if I read it correctly it says  
6 basically if this was a new plant it could not be  
7 built because it would have to be, you can't do a  
8 single-pass plant unless you can make it as safe  
9 as one that isn't single-pass cooling. And  
10 nobody's claiming that anybody's going to achieve  
11 that kind of standard.

12 Now, having said that, I understand that  
13 as the draft regulations are written currently,  
14 that this is not likely to be deemed a new plant  
15 because they're using the same pipes and same  
16 pumps that they've always used. So I'm not saying  
17 that's controlling authority for this case.

18 The, what do they call them, phase two,  
19 stage two, category two, whatever it is, plants  
20 that are rebuilds and remodels of existing plants  
21 have a different standard. But let's -- when  
22 you're discharging your duties what I want to  
23 bring to your attention, and that standard isn't  
24 really set because the brand new regulation just  
25 came out, what, the 15th of this month, and

1       there's a review period for them. And so they  
2       aren't really the regulations yet, as Mr. McKinsey  
3       pointed out. You know, we don't really know what  
4       the letter of the law will be.

5               What I want to point out is if this is a  
6       plant -- in a way this is a new plant, regardless  
7       of what the technical laws say about definition of  
8       a new plant. This is a plant that doesn't exist  
9       today. There is no permit to operate the power  
10      plant on the site that this new plant is going to  
11      be constructed. There's a permit to operate the  
12      pumps. There's no reason to operate the pumps  
13      except to keep the fouling down at this point.  
14      Because you can't operate the plant, and you  
15      couldn't operate the plant for a year and a half.  
16      So this is really a new plant and a new impact.

17             But regardless of what the law says, it  
18      really is new production of energy and associated  
19      use of water going on in Santa Monica Bay. I'm  
20      not saying that the law controls, I'm saying you  
21      got to think about the fact that if it were  
22      treated as a new plant you couldn't build it at  
23      all is the way I read that case.

24             And so in thinking about well, are we  
25      doing enough under CEQA, are we doing enough under



1 the Coastal Act, are we doing enough under the  
2 Clean Water Act, all I'm saying is this thing's  
3 getting through by a hair, if at all, if it has to  
4 be a new plant to get by the Clean Water Act at  
5 all. And the reason for that is that we aren't  
6 going to allow -- this country, Republican  
7 Administration, Second Circuit Court of Appeals,  
8 at least, are not going to allow people to do the  
9 damage to the ocean environment which this plant  
10 necessarily does in the future.

11 This is what they may allow. There will  
12 be a few more that will slide in before the rules  
13 will get too tough. But there's other ways to  
14 generate energy. EPA knows that. EPA is not  
15 hostile to energy, not in this Administration.

16 And so it seems to me in discharging  
17 your duties you ought to do what you can to make  
18 the impact from this plant, which is going to be  
19 larger than new plants for a foreseeable time to  
20 come, to be no larger than it actually has to be.

21 That's all the comments I have. You  
22 folks have received, I believe, our written  
23 comments, informal though they were.

24 HEARING OFFICER SHEAN: Yes, we did.

25 PRESIDING MEMBER KEESE: Thank you.

1 HEARING OFFICER SHEAN: And as you  
2 indicated in your written comments, you have  
3 something prior to March 1st, send that in.

4 MR. PERKINS: Thank you very much.

5 MS. MURPHY: Michelle Murphy,  
6 Intervenor. I have a lot of disjointed ideas and  
7 I'm not sure how to pull them together. Some of  
8 it is about the process. I've stood here many  
9 times over the last, is it only three years? It  
10 seems longer. And often, I'm very pleased tonight  
11 we're here at 6:00, we can go home and have  
12 dinner. And you'll probably be able to fly out.

13 But usually we were held, as a public we  
14 were held to five minutes at the end of a hearing.  
15 And often people were packing up to get on the  
16 planes to get out of here to go back to  
17 Sacramento. That's not the best way to hear what  
18 the public has to say.

19 Substantively, from the beginning of  
20 three years ago or even earlier, I was saying  
21 things like it's self-evident if you look at the  
22 map over there, this power plant is built too  
23 close to the water. This power plant means there  
24 is no beach access. It is illegal to walk from  
25 our house in Manhattan Beach, the edge of the

1 beach, to beyond the power plant many times in the  
2 winter because there's no way to walk between here  
3 and there. You have to go up to the highway, that  
4 is to say Vista del Mar, to get across.

5 I've said that for the last three or  
6 four years and no one -- I thought beach access  
7 was an important issue, but apparently it isn't.

8 I want to say something about air  
9 pollution. I know it's all bought and paid for  
10 with the credits, but this is going to give kids  
11 asthma. It's going to, you know, shorten lives of  
12 people with lung diseases. This is what is going  
13 to happen I know it's legal because they bought  
14 the energy credits from plants that went out of  
15 business long ago and far away, and that's  
16 considered to be all right. But I don't like it.

17 The main thing, though, is the only  
18 issue that's sort of left alive is the killing of  
19 the fish in the Bay. I just talked to someone  
20 recently, didn't know much about this, asked what  
21 was going on here. And we discussed how nice it  
22 is that there are dolphins in the Bay.

23 When my husband was growing up in this  
24 town there weren't. It was probably pollution; it  
25 was probably over-fishing by fishermen. It's

1 possible that your decision if it stands as it is  
2 today might contribute to no dolphins in the  
3 future. And that would be a real sad thing.  
4 That's something that's only recently come back to  
5 this Bay, and it's something we all enjoy.

6 I don't quite understand why there's no  
7 study being done about the effects of this. I  
8 just simply, I can't understand it. It was over  
9 three years ago; I'm sure it's been five or even  
10 longer years ago that applicant was planning on  
11 coming here and asking for a new power plant.  
12 They had plenty of time to do a study. They have  
13 plenty of money to do a study. You know,  
14 obviously it's not the expense of a study. But  
15 they never got around to doing it.

16 And now apparently the Energy Commission  
17 is not going to ask them to do a study. Again, I  
18 don't understand the issue of time because there  
19 is no energy crisis. That was a fake thing, we  
20 know that. This plant is not working right now  
21 and, you know, our air conditioners are working.

22 And it isn't a question of money. The  
23 applicant has plenty of money to do the study.  
24 Why is it we're not doing it? The only reason I  
25 can think of, I mean obvious reason, is because

1 the answer is not something you want to hear. The  
2 applicant wants to build a power plant and make  
3 money, but the Energy Commission is supposed to  
4 want to protect the people of California and the  
5 environment of California. So why they don't want  
6 to answer that -- have that question answered is  
7 bewildering to me, and I -- it hasn't been  
8 explained to me to my satisfaction, and I can't  
9 believe that you can, frankly.

10 I guess that's all, thank you.

11 HEARING OFFICER SHEAN: Thank you, Ms.  
12 Murphy.

13 PRESIDING MEMBER KEESE: Thank you.

14 MR. NICKELSON: My name is Richard  
15 Nickelson; I'm an Intervenor, and I live at the  
16 north end of Manhattan Beach.

17 And, Commissioner Keese and Officer  
18 Shean, I appreciate the opportunity to stand here  
19 for a minute. And I would be remiss if I didn't  
20 say I knew Dr. Reede when he was just Mister.

21 (Laughter.)

22 MR. NICKELSON: And I'm really proud of  
23 him, you know. Congratulations.

24 DR. REEDE: Thank you.

25 MR. NICKELSON: I just have two simple

1 things. On your PMPD, your visual, page 186, Vis-  
2 2, the first paragraph -- or the paragraph of Vis-  
3 2 deals with planting the trees along the eastern  
4 edge of the project.

5 Then I want you to refer back to page  
6 178. You have a picture, and your staff did  
7 rendering of what it would look like after the  
8 tanks have been removed, which was really  
9 impressive.

10 And I don't know that in your PMPD, is  
11 it intended that the applicant will do what has  
12 been suggested, or is there going to be -- I know  
13 we had talked at one time about bringing maybe  
14 members of the community together with the Cities  
15 of El Segundo and Manhattan Beach to decide what  
16 that would look like.

17 And I don't understand, is this going --  
18 because your PMPD, I think it states that maybe  
19 Manhattan Beach and El Segundo will be involved,  
20 but it doesn't deal with anyone from, you know,  
21 the residents that live in the area.

22 Is the picture on page 178 what you  
23 expect from the applicant?

24 DR. REEDE: Could you hold on one  
25 second, --

1 MR. NICKELSON: Sure.

2 DR. REEDE: -- please, while I get to  
3 that page. Because I know there was some concern  
4 expressed by staff as the pictures not matching  
5 staff's final staff assessment.

6 You said page 178 under viewer exposure?

7 MR. NICKELSON: Yes, and it shows there  
8 the three pictures where your left hand is. And  
9 the bottom picture shows the rendering of what it  
10 would look like after the tanks have been removed  
11 and they would be planting trees behind the  
12 Chevron Station along the eastern edge up to the  
13 entrance of the property.

14 It shows, you know, it's a really  
15 attractive rendering of what it could look like.

16 DR. REEDE: So to make sure that I'm  
17 clear in what you're asking, you're saying the  
18 pictures in 178 do not reflect what staff --

19 MR. NICKELSON: No. The third picture  
20 down, the bottom picture shows a rendering of what  
21 it would look like after the tanks have been  
22 removed and the trees have been planted along the  
23 eastern edge from 45th Street down to the entrance  
24 to the, you know, to the facility.

25 The bottom picture. Now, is that what

1       you're expecting? Is that what you're imposing on  
2       the applicant to do?

3               DR. REEDE: Well, --

4               MR. NICKELSON: Will they do that, or  
5       will it be something less than that, or --

6               DR. REEDE: Well, that's what the  
7       Committee has deemed as desired.

8               MR. NICKELSON: Okay.

9               HEARING OFFICER SHEAN: Or perhaps --

10              DR. REEDE: And the conditions --

11              HEARING OFFICER SHEAN: --  
12       representative is a better word.

13              MR. NICKELSON: Yes, but what can we  
14       expect if we can't expect that? I mean you could  
15       say well, that's desirable. But if the applicant  
16       can come back, you know, later and plants two  
17       trees and said, hey, this is what you get. Is  
18       that what we get or --

19              HEARING OFFICER SHEAN: Well, that's why  
20       I used the word representative. I mean it may not  
21       be tree for tree, but --

22              MR. NICKELSON: It's going to be more  
23       than --

24              HEARING OFFICER SHEAN: --representative  
25       of what we have in mind in Vis-2.



1 DR. REEDE: I might add that our  
2 compliance project manager will have the ultimate  
3 review authority over the landscaping plan, the  
4 final landscaping plan that the applicant will  
5 actually submit.

6 I believe there's a condition where  
7 representatives of the City of Manhattan Beach and  
8 the City of El Segundo will take input and provide  
9 that input to the compliance project manager.

10 Now, what was discussed during  
11 evidentiary hearings was that the City of El  
12 Segundo would have a planner and residents. The  
13 City of Manhattan Beach would have one of their  
14 staff planners and residents to come up with this  
15 final landscaping scheme.

16 Now whether those trees grow as fast as  
17 advertised by the nursery I can't call that.  
18 But, --

19 MR. NICKELSON: I understand.

20 DR. REEDE: -- basically a concept was  
21 to be arrived upon by residents, representatives  
22 of the City of Manhattan Beach and the City of El  
23 Segundo, in addition to staff planners from both  
24 the Cities --

25 MR. NICKELSON: Now, I like that, what

1       you just said, resident representatives which  
2       could be the --

3               DR. REEDE:   Right, because that's what  
4       was --

5               MR. NICKELSON:  -- Murphy, Perkins,  
6       Nickelson --

7               DR. REEDE:  -- discussed during the  
8       evidentiary hearings when I believe --

9               MR. NICKELSON:  But it's not in the PMPD  
10      that way.

11              MR. MCKINSEY:  Let me -- I'd like to  
12      say, because I think I can respond exactly what  
13      this condition says, and maybe what it doesn't  
14      say, and Mr. Nickelson's point.

15              The second paragraph of Vis-2, the very  
16      condition you're citing is the one that describes  
17      the committee makeup.  It doesn't say residents.  
18      It says two voting members from the City of  
19      Manhattan Beach, meaning that the City of  
20      Manhattan Beach is going to have the ability to  
21      appoint those two members to the committee.

22              Along with two voting members from the  
23      City of El Segundo.  And two voting members, two  
24      members that get one vote from the applicant.  And  
25      additionally there are advisory numbers in the

1 form of the California Coastal Commission and the  
2 CPM.

3 And then the final product of that  
4 committee, that input from the committee, causes  
5 the applicant to then submit a document to the CPM  
6 at the Energy Commission which the Coastal  
7 Commission can then also comment on again.

8 And so the goal was to really make sure  
9 that the community input was incorporated in the  
10 design. However, that definitely doesn't say  
11 resident, per se. It says there will be two  
12 voting members from the City of Manhattan Beach,  
13 and it would be your City that would determine who  
14 those members are.

15 Then here's specifically what it doesn't  
16 cite the picture of the photo. And what it says  
17 specifically is regarding the line of sight that  
18 you're describing, it's in the bottom paragraph on  
19 page 186. It says, about half way down, beginning  
20 with B, "tree and shrub plantings along Vista del  
21 Mar to screen views of the structures while  
22 preserving view corridors to the Bay."

23 And kind of prior to that it says,  
24 "continuous tree canopies on eastern roadside  
25 perimeter to enhance visual unity of the Vista del

1 Mar corridor, compatibility of the ESPR project  
2 with its setting, and at least partial long-term  
3 screening of upper portions of the HRSG."

4 So, A kind of describes mostly what's  
5 going on at the north end of Vista del Mar,  
6 because it's talking about the HRSGs. B talks a  
7 little more about generally what the screening  
8 requirements are.

9 And that was the language that we had  
10 agreed upon along with the language in the  
11 paragraph above that we agreed upon at the last  
12 minute that was designed to allow those members  
13 that want to have an input on how to screen and  
14 how much to screen to kind of compete with, I  
15 think, a Coastal Commission and a few other  
16 differing viewpoints that we don't want to totally  
17 screen; we wanted to preserve view corridors.

18 So this language was our goal of  
19 creating a committee that allows more final  
20 decision on how to balance the need to screen  
21 views with the ability to maintain view corridors  
22 to the Bay, but try to screen parts of the plant.

23 But it doesn't require us to match a  
24 certain specific photo in the language of the  
25 condition. Clearly, though, however, that's

1 partly what the compliance project manager and the  
2 committee has the ability to drive, is here were  
3 the photos we talked about, what we're striving to  
4 accomplish.

5 One of the reasons we didn't cite those  
6 photos were because of the ultimate decision about  
7 how to make a decision between screening and  
8 allowing views wasn't something we wanted to hold  
9 ourselves to a particular photo. We wanted the  
10 committee to be able to really sort that out and  
11 work it out.

12 So, I mean, I'm answering your question.  
13 It doesn't say we will do that photo. What it  
14 says is we'll have a process that will work this  
15 way that will make sure that inputs can be figured  
16 out. And ultimately it's going to put it in the  
17 hands of the CPM. The CPM gets to participate in  
18 an advisory role on the committee. And then the  
19 CPM gets the final, you've done a good job, and  
20 certainly the CPM is going to incorporate in that  
21 how well everybody's views are represented, and it  
22 represents a good compromise decision.

23 But it's definitely in the hands of the  
24 CPM to finally decide how well that obligation to  
25 screen but also preserve the view corridors is

1 left.

2 MR. NICKELSON: Okay. No, I distinctly  
3 recall what Dr. Reede said, though, that when we  
4 finished this the last time that we were together,  
5 you know, residents were an integral part of that.  
6 Not just the two people like you're talking about  
7 right now, you know, the two representatives from  
8 El Segundo and from Manhattan Beach.

9 You know, at that last meeting it was  
10 discussed, you know, that residents -- there was  
11 an involvement of residents.

12 Dr. Reede said that, and that's exactly  
13 what I remember. Now, --

14 MR. MCKINSEY: I looked at the  
15 transcript about this. I know what we did say was  
16 I think the City of Manhattan Beach -- Laurie's  
17 not still here, but I think, for instance, they  
18 indicated that they would certainly want to select  
19 at least one member would want to be somebody up  
20 there with a stake in the outcome. They would be  
21 bound to that; it's certainly going to be up to  
22 the City Council probably to decide who will be  
23 those members. Or however the City of Manhattan  
24 Beach wants to allocate that responsibility down.

25 And so there's an opportunity for a

1 resident to be a member, but this definitely  
2 matches what we agreed upon and what our  
3 transcript said.

4 And so, I mean it may be that either,  
5 you know, you may have misunderstood the words,  
6 or, you know, there might have been a reference to  
7 resident, but I can definitely tell you what we  
8 agreed upon was this language.

9 The question is whether you're really  
10 happy with that or not.

11 MR. NICKELSON: Well, I was happy with  
12 what Dr. Reede said because that was the way that  
13 I recall it being stated. It's not what you're  
14 saying, John.

15 Now, the other thing I'm saying is, you  
16 know, it's in this -- I'm one of the residents  
17 that's going to have to look down on the tank  
18 farm. And brings up the second question that I  
19 had, and that was with regard to Land-8. And it's  
20 not in the PMPD, but it said, you know, that we  
21 had come to an agreement.

22 And, Dr. Reede, I'm going to just quote  
23 something that was an email from you, and this is  
24 dated back in December 20, 2002. Let's see, "the  
25 land use changed suggested by Mr. Nickelson was

1 more appropriately attached to Land-8 which  
2 discussed the tank farm rather than Land-6 which  
3 talks about the sewers.

4 And that has to do with after the  
5 completion and the tanks have been removed, and  
6 that's been blacktopped over, the tank farm. That  
7 that wouldn't be used for a junk yard, you know,  
8 like we have if you go to the Scattergood. And if  
9 you look at the back of the Scattergood where they  
10 have all of their trash, their pipes and  
11 everything else. They just use that.

12 It was an agreement that this would not  
13 be allowed. You and Mr. Cabe agreed that, John,  
14 that that would never be used as a dumping area or  
15 a storage area. It would be a laydown area when  
16 work had to be done. And other than that, only a  
17 parking lot.

18 Now, that was to be added to Land-8.  
19 And I don't see anything in that ties to that in  
20 Land-8, or even refers to the tank farm, you know,  
21 in this final PMPD.

22 MR. MCKINSEY: The reason why is because  
23 the numbers changed because we deleted two land  
24 conditions. Land-6, second paragraph says,  
25 "following site remediation, the tank farm area



1 shall be paved and landscaped in accordance with  
2 the landscape plan submitted and approved pursuant  
3 to condition of certification Vis-2. The tank  
4 farm uses will be restricted to parking in the  
5 designated parking areas, and improved uses in the  
6 paved area south of the designated parking areas.  
7 Approved uses include temporary equipment staging  
8 and overflow parking. The paved areas shall not  
9 be used for permanent storage of vehicles,  
10 equipment or materials."

11 MR. NICKELSON: Thank you. Where was  
12 that, John?

13 MR. McKINSEY: That's Land-6.

14 MR. NICKELSON: Land-6, thank you.

15 MR. McKINSEY: The number changed.

16 MR. NICKELSON: Okay. That's it. Dr.  
17 Reede, do you have anything to add to that, or --

18 DR. REEDE: No.

19 (Laughter.)

20 MR. NICKELSON: Coward.

21 (Laughter.)

22 MR. NICKELSON: Thank you.

23 HEARING OFFICER SHEAN: All right, thank  
24 you, Mr. Nickelson.

25 Is there anyone else who's in the

1 audience who would like to make some public  
2 comment?

3 Anything from any party before we  
4 conclude the hearing?

5 MR. MCKINSEY: No, we're done.

6 HEARING OFFICER SHEAN: You're done, all  
7 right.

8 I think it's fair to say the Committee  
9 has a lot to chew on. I think in some respects  
10 the questions that we've asked are points that  
11 have been raised, have raised additional  
12 questions.

13 So what we're going to do is go back to  
14 Sacramento; we're going to review the transcript.  
15 We're going to wait for any additional comments.  
16 And then figure out where to go from there.

17 I think all the parties have made a  
18 sincere effort to address the legal and factual  
19 issues that are before us. I know the Committee  
20 has, this is one of those Solomonesque type  
21 situations because it appears at the outset that  
22 you're going to have to fall on one side of the  
23 fence or the other. And I appreciate the staff  
24 attempting to make something that's a little more  
25 close to the middle ground.

1           But I think it's just fair to say that  
2       there's a lot for the Committee to work on, and we  
3       intend to deliberate it fully. We may come back  
4       to you with either additional questions of a  
5       factual nature, or ask you to find something in  
6       the record, or questions of a legal nature. So  
7       that's about where we are. And we'll just let you  
8       know, as we know, how we're going to progress.

9           So, if there's nothing further we'd like  
10      to thank you for your attendance. And we are  
11      adjourned.

12           (Whereupon, at 6:46 p.m., the hearing  
13      was adjourned.)

14                           --o0o--

## CERTIFICATE OF REPORTER

I, JAMES RAMOS, an Electronic Reporter,  
do hereby certify that I am a disinterested person  
herein; that I recorded the foregoing California  
Energy Commission Hearing; that it was thereafter  
transcribed into typewriting.

I further certify that I am not of  
counsel or attorney for any of the parties to said  
hearing, nor in any way interested in outcome of  
said hearing.

IN WITNESS WHEREOF, I have hereunto set  
my hand this 2nd day of March, 2004.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345